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TRANSCRIPT OF RECORD

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 166

SAMUEL D. CATES, TRADING AS GLORY BEE PRODUCTS AND GLORY BEE,

Petitioner,

vs.

JOHN HADERLEIN, AS POSTMASTER OF THE CITY OF CHICAGO, IN THE COUNTY OF COOK AND STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE GUNTHORP-WARREN PRINTING COMPANY, 216 WEST JACKSON, CHICAGO

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In the
United States Court of Appeals
For the Seventh Circuit

No. 10312

SAMUEL D. CATES, trading as GLORY BEE PRODUCTS and GLORY BEE,
Plaintiff-Appellant,

vs.

JOHN HADERLEIN, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois,
Defendant-Appellee.

U. S. C. A.-7
FILED
FEB 5 - 1951
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

The Schaffer Press, Inc.—ANdover 3-6350

TRANSCRIPT OF RECORD FILED DECEMBER 18, 1950

PRINTED RECORD

In the

United States Court of Appeals

For the Seventh Circuit

No. 10312

SAMUEL D. CATES, trading as GLORY BEE PRODUCTS and GLORY BEE,
Plaintiff-Appellant,

vs.

JOHN HADERLEIN, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

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1

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

SAMUEL D. CATES, trading as GLORY BEE PRODUCTS and GLORY BEE,
Plaintiff-Appellant,

vs.

JOHN HADERLEIN, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois,
Defendant-Appellee.

Civil Action No. 50 C 1220

STATEMENT REQUIRED BY RULE 10(b) OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. The time of commencement of the suit was August 30, 1950.

2. The names of the parties are, and since the commencement of the suit have been:

Samuel D. Cates, trading as Glory Bee Products and Glory Bee, Plaintiff-Appellant, and

John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois, Defendant-Appellee.

3. The dates when the respective pleadings herein were filed were:

Complaint, August 30, 1950
Answer, September 19, 1950

4. The defendant was not, nor was any other party arrested, nor was bail taken or property attached or arrested.

5. A hearing was held on plaintiff's motion for a preliminary restraining order on September 25, 1950, before Judge Michael L. Igoe, on which date the said motion was overruled and the matter set for hearing on plaintiff's
2 motion for a permanent injunction on October 6, 1950. Said motion for permanent injunction was argued on October 6, 1950 and an order was entered on said date taking the cause under advisement.

6. Final order of Court was entered on October 27, 1950, denying plaintiff's motion for injunction and dismissing the complaint at plaintiff's cost.

7. Notice of Appeal was filed on November 10, 1950.

Frank E. Gettleman
Arthur Gettleman
Edward Brodkey
Attorneys for plaintiff-appellant.

3 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of October (it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 175th Year

Present: Honorable John P. Barnes, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable William H. Holly, District Judge
Roy H. Johnson, Clerk
Thomas P. O'Donovan, Marshal
Friday, October 27, 1950
Court met pursuant to adjournment
Present: Honorable Michael L. Igoe, Trial Judge

4 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

Be It Remembered, that on to-wit, the 30th day of August, 1950, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

5 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

COMPLAINT

Samuel D. Cates, doing business as Glory Bee Products and Glory Bee, plaintiff herein, by Frank E. & Arthur Gettlemen, Edward Brodkey and Thomas F. Reilly, attorneys complains of John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois, and for cause of action alleges:

1. This is a suit in equity, of a civil nature, arising under the laws of the United States, relating to an Act of Congress regulating the Post Office; to-wit, Title 28, United States Code Annotated, Section 1339, being an Act of June 25, 1948, c. 646, 62 Stat. 932, which provides that "the District Court shall have original jurisdiction of any civil action arising under any Act of Congress relating to the Postal service." It also presents and
6 involves an actual controversy between plaintiff and defendant, and the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00). The suit is brought under the general equity jurisdiction of this court, to enjoin and restrain enforcement of and to set aside and hold for naught a "fraud order" against plaintiff herein issued by the Postmaster General on August 16, 1950.

2. Plaintiff brings this suit to prevent irreparable injury and damage to him in the conduct of his business and property used by him in the distribution and sale of

incense and similar products in interstate and intrastate commerce and to prevent and restrain the defendant, his agents and all persons acting for him from carrying out and executing the terms and conditions of the "fraud order" of the Postmaster General, to this defendant directed, as will hereinafter more fully appear.

3. And plaintiff is informed and believes and on the basis of such information and belief represents the fact to be that the said defendant, John Haderlein, in his capacity as Postmaster of the City of Chicago aforesaid has heretofore and continues to return mail addressed to the plaintiff herein, to the senders of such letters and mail matter with the words "fraudulent: mail to this addressee returned by order of the Postmaster Gen-
7 eral" plainly written or stamped on the outside of such letters or mail matter; and the said defendant, as Postmaster aforesaid, has refused to pay postal money orders drawn to the order of plaintiff, in connection with his said business, and has informed and continues to inform the remitter of any such postal money orders that payment thereof has been forbidden him, all in accordance with the terms of the "fraud order" hereinabove referred to, a copy of which is hereafter attached to this Complaint and made a part hereof; and plaintiff represents that unless the Postmaster aforesaid is restrained and enjoined forthwith from so doing and from carrying out the terms of the said "fraud order" plaintiff will be irreparably injured, during the course of this hearing on the propriety of the Postmaster General having entered such order, in that plaintiff will be damaged irreparably in his name and good reputation among his customers and will suffer great loss in sales in connection with his said business, including divers large profits which he would otherwise make from same.

4. The plaintiff, Samuel D. Cates, is an individual, residing in the City of Chicago, County of Cook and State of Illinois, within the Northern District of Illinois and the Eastern Division, with his principal place of business similarly located within the jurisdiction of this Court.
8 He is engaged in the business of distributing and selling to purchasers through and by means of the United States mails, products called "Glory Bee Fast Luck Brand Incense", and "Incense Numbers Tablets".

5. That on the sixth day of March, A.D. 1950, complaint was filed with the Solicitor of the Postoffice Department, by the Chief of the Fraud Section thereof, recommending that the Postmaster General issue a fraud order, forbidding delivery of mail and payment of money orders to plaintiff herein, who was therein charged with conducting a scheme or device for obtaining money through the mails by means of false or fraudulent pretences, which were alleged to be "knowingly false or fraudulent", in violation of Sections 259 and 732 of Title 39 U. S. Code (Rev. Stat. 3929 and 4041, as amended). Said proceeding was entitled, "In the Matter of the Complaint that Glory Bee Products and Glory Bee at Chicago, Illinois are engaged in conducting a scheme for obtaining moneys through the mails by means of false and fraudulent pretences, etc.," such proceeding bearing Docket No. F. & L. 19/9. Specifically, the complaint before the Solicitor of the Postoffice Department charged that this plaintiff had received and was receiving money through the mails, as aforesaid, in the sale of his said products which he sold by circular matter sent through the mail; and the complaint charged that by means of such circular matter
9 plaintiff had been falsely and fraudulently representing to the public that the use of said products or some of them would improve the health of the users, their financial condition, their social power, and would enable them to meet their obligations, obtain profitable employment, "pep" them up, accomplish wonderful changes for the better in their homes, improve everything in their lives and bring "good luck" to users. The answer of plaintiff to said complaint was filed thereafter in said proceedings before the Postoffice, and said answer denied specifically that plaintiff had made any false or fraudulent representations or promises as alleged in the Complaint and denied that plaintiff had violated the Statute in such case made and provided.

6. Issue being so joined, thereafter hearings were had in said proceeding before the Honorable James C. Haynes, Jr., Senior Trial Examiner of the Postoffice Department on March 22, 1950. At the conclusion of the Government's case, plaintiff moved for a finding in his favor, dismissing the Complaint for complete failure of the Government to make out a prima facie case against

him, in support of which plaintiff filed his Brief of the law and the facts.

7. That on the 14th day of August, 1950, the said Trial Examiner filed his Finding of Fact and Recommendations to the Postmaster General For the Issuance of a Fraud Order and said Finding and Recommendations were approved and adopted by Frank J. Delany, Solicitor of the Postoffice Department on the aforesaid date, a true and exact copy of which Findings of Fact and Recommendations to the Postmaster General, together with the approval and adoption of same is hereto attached, marked Exhibit "A", and made a part hereof.

8. That on the 16th day of August, 1950, the Honorable J. M. Donaldson, Postmaster General, issued his "fraud order" in the above-entitled administrative proceeding, the same being order No. 43833, wherein and whereby the said Postmaster General, upon evidence satisfactory to him, forbade the Postmaster at Chicago, Illinois to pay any postal money orders drawn to the order of plaintiff herein under the trade names hereinabove set out and to return all mail addressed to plaintiff as aforesaid, marked "fraudulent", as hereinabove set out, a true and exact copy of which order is hereto attached, as Exhibit "B" and made a part hereof.

9. The plaintiff, believing himself aggrieved by the issuance of said "fraud order" by the Postmaster General, on the said 16th day of August, 1950, and considering it erroneous, void and unlawfully prejudicial to the rights of this plaintiff, and plaintiff being without remedy in the premises, except by the traditional use of a Bill in
11 Equity to enjoin the execution of said order, hereby files this Complaint to review the said "fraud order", and the findings and recommendations upon which it is based, and prays that this Honorable Court may review the said proceedings before the said Postoffice Department, and after a hearing thereof, grant to the plaintiff such relief as he deserves.

10. In support of this Complaint, plaintiff makes the following statement of points, indicative of the many respects in which the said Postmaster General, his Solicitor and the Trial Examiner erred in their conduct of the administrative proceeding and their findings and conclusions, recommendations and order in connection therewith:

One: The Postmaster General did not have jurisdiction to issue the original Complaint, and there was no jurisdiction so to do.

Two: The complaint to the Solicitor of the Postoffice Department does not allege facts to give the Postmaster General jurisdiction over the plaintiff.

Three: The findings of the Trial Examiner as to the facts and the recommendations of the Trial Examiner are not supported by the evidence.

Four: The findings of the Trial Examiner as to the facts and his recommendation to the Postmaster General are not supported by substantial evidence.

Five: The findings of the Trial Examiner as to the
11 facts and his recommendation are not sufficient in law to support or sustain the "fraud order" of the Postmaster General.

Six: The testimony and the entire record in the proceedings before the Postoffice Department shows that the "fraud order" is not in the public interest.

Seven: The testimony and the entire record in the proceeding before the Postoffice Department shows that the plaintiff was not and is not receiving money through the mails by means of false or fraudulent pretences which are "knowingly false or fraudulent" by the means set out in the Complaint in the administrative proceeding or any other.

Eight: That the Trial Examiner in making his findings of fact, the Solicitor in adopting them and the Postmaster General in his issuance of the "fraud order" above referred to have each demonstrated their respective bias in judging the facts presented by the record.

Nine: The said Postmaster General in his conduct of the administrative hearing and the proceedings aforesaid in his Department has violated each and every the terms, conditions and requirements of the Federal Administrative Proced. Act of 1946, (60 Stat. 237, 5 U. S. Code Annotated, Sec. 1001, as amended), particularly Sections 2, 7, 8 and 11 thereof; and plaintiff says that the tenure and control of the Trial Examiners of the Postoffice De-
partment in such proceedings are in violation of the
13 Act aforesaid and such proceeding is therefore void.

Ten: The Trial Examiner has quoted in his findings as to the facts only from the Government's exhibits and testimonial evidence and not from the exhibits and testimonial evidence adduced by plaintiff herein.

Eleven: The Trial Examiner and the Solicitor of the Postoffice Department on approval of the Trial Examiner's findings, erroneously and without basis of fact found that one Alice Perkins, who had been for some years an employee of plaintiff herein in his conduct of other enterprises, as a consequence thereof had such privity with plaintiff herein in the conduct of the instant business as to entitle the Trial Examiner to take official notice of the records in another case involving said Alice Perkins alone.

Twelve: The Trial Examiner and the Solicitor aforesaid erroneously and without basis of fact found that plaintiff herein was aware of the execution and filing by the said Alice Perkins of an affidavit of discontinuance in another proceeding against the said Alice Perkins had before that time.

Thirteen: The said Trial Examiner erroneously and without basis of fact found that the said Alice Perkins was at the time of this proceeding in plaintiff's employ; from which the Trial Examiner erroneously and without basis of fact inferred that any such employ was in connection with the business of plaintiff subject of this
14 suit; and said Trial Examiner ignored the testimony of one William J. Means, a Postal Inspector, who testified for the Government that plaintiff had told him that the said Alice Perkins was not employed by the said plaintiff in connection with the business subject hereof.

Fourteen: The trial Examiner and the Solicitor aforesaid erroneously and without basis of fact, found as a matter of fact that the incense and numbers tablets subject of this proceeding possessed no property not possessed by any other ordinary incense generally; from which the Trial Examiner erroneously inferred and concluded that such products did not possess the qualities or characteristics described by plaintiff in his advertisement.

Fifteen: The Trial Examiner and the Solicitor on approval of his findings erroneously and without basis of fact found that the advertising literature used in the Perkins case aforesaid and in the instant proceeding was "designedly worded and composed so as to appeal to persons possessing" superstitious beliefs.

Sixteen: The Trial Examiner and the Solicitor aforesaid erroneously and without basis of fact found that on account of the background of plaintiff and the said Per-

kins, their commercial motive, (concerning which no pertinent evidence appears) and certain other nebulous circumstances, that an inference could be reasonably drawn that plaintiff herein does not believe in "luck".

15 Seventeen: The Trial Examiner and the Solicitor aforesaid erroneously and without basis of fact found, concluded and inferred that since plaintiff conceded that the use of incense "would not cure any disease, chronic or otherwise, or improve the health of users thereof, *leaving out the mental aspect*" (underscoring ours), the said plaintiff thereby demonstrated that any representations he might have made in his advertising was therefore "knowingly" false.

Eighteen: The aforesaid Trial Examiner and Solicitor erroneously and without basis of fact erred in finding that plaintiff herein was not selling his products hereinabove described "for what they are, without lying about them", in identical manner as appears to have been done in Dolan *v.* Hurley, 283 Fed. 695, affd. 297 Fed. 825.

Nineteen: The said Trial Examiner and the Solicitor upon approval of his findings erroneously and without basis of fact inferred and concluded that the use of so-called "disclaimers" of any claim to supernatural power in plaintiff's incense proved, ipso facto, that plaintiff's representations were "knowingly" false.

Twenty: The said Trial Examiner and Solicitor further erroneously and without basis of fact found that the plaintiff herein had vouched for the accuracies of the "legend" surrounding the use of incense and as-

16 sociated products, namely that they would bring their users luck.

Twenty-one: The Trial Examiner and the Solicitor also erroneously and without basis of fact found that the unsolicited "testimonials" of said users on one of plaintiff's circulars tended to prove, ipso facto, that plaintiff intended to convince his customers of the efficacy of his products, and that it therefore follows as a matter of course his representations must be "knowingly" false.

Twenty-two: The said Trial Examiner and Solicitor erroneously and without warrant of law or facts found and concluded that plaintiff vouched throughout his advertising literature for the validity of the "legend" that the use of incense brings luck and endorsed it as worthy of belief.

Twenty-three: The said Trial Examiner and Solicitor erroneously, without warrant of law or fact, concluded that plaintiff herein misled his prospective customers to believe that the "legend" in question is reality.

Twenty-four: The said Trial Examiner and Solicitor further erroneously and without warrant of fact found that plaintiff had taken great pains to insure that his "disclaimers" would exert only negligible effect upon the minds of his customers.

Twenty-five: The Trial Examiner, Solicitor and the Postmaster General erroneously, and without warrant of law or fact found that plaintiff's advertising claims
17 for his incense "are completely opposed to common knowledge and experience" and "their falsity may be inferred from their preposterous character"; that the fraudulent purpose of plaintiff to deceive his said customers is "self-evident".

Twenty-six: That the Trial Examiner erroneously admitted into evidence testimony on behalf of the Government by allegedly expert witnesses, who neither had knowledge of the particular products in question, nor had ever made any chemical or clinical tests concerning them.

Twenty-seven: That the Trial Examiner erroneously admitted, over the objections of plaintiff's attorneys, other irrelevant, immaterial and incompetent testimony offered on behalf of the Government.

Twenty-eight: That the said Trial Examiner erroneously excluded relevant material and competent testimony offered on behalf of the plaintiff.

Twenty-nine: That the said Postmaster General erred in making his "fraud order" too broad.

Thirty: That the proceedings before the Postoffice Department, as they are conducted, denied plaintiff herein a fair hearing and due process of law in the procedure of said administrative agency, and the resulting administrative determinations, findings and order cannot therefore be made effective without depriving plaintiff of his property without due process of law, in violation of
18 the 14th Amendment of the Constitution of the United States.

Thirty-one: That there was no valid and legal complaint issued by the Solicitor of the Postoffice Department against plaintiff.

Thirty-two: That the Trial Examiner based his findings, in whole or in part, upon alleged facts, situations or conditions, and information with respect to which must have been obtained by the Trial Examiner from various sources without plaintiff's knowledge, and neither offered or introduced in evidence in any open hearing nor made a part of the record in this case, and to which plaintiff never had access, and as to which he had no opportunity to cross-examine, explain or refute, and such alleged facts so considered did not come from any official source which the Trial Examiner had the right to notice officially, said alleged facts not having been published by any public authority, Government or State, and not being matter of universal recognition, common notoriety and indisputability.

Thirty-three: That the findings of the Trial Examiner, as adopted by the Solicitor and the Postmaster General are not supported by any evidence, and are arbitrary and transcend the Postmaster General's constitutional and statutory powers, and are accordingly void and of no effect; the Postmaster General's said "fraud order" being necessarily based upon said invalid findings, is therefore arbitrary and transcends the constitutional and statutory rights of said Postmaster General, and is therefore, 19 void and of no effect.

Wherefore, plaintiff prays:

(a) That an injunction forthwith issue enjoining and restraining the defendant, his agents, servants and employees from treating the mail matter of plaintiff as unmailable and from enforcing and carrying out the terms and conditions of the "fraud order" heretofore issued by the Postmaster General, a true and exact copy of which is attached to and made a part of this Complaint as Exhibit "B".

(b) That the said defendant, his agents, servants and employees be forthwith ordered to release and deliver all mail addressed to plaintiff herein under his trade-name Glory Bee Products and Glory Bee and to pay all money orders drawn in favor of the said plaintiff under the trade-names hereinabove set out.

(c) That upon a full hearing of the issues herein, it be adjudged that the said Postmaster General, the Solicitor of the Postoffice Department and the Trial Examiner re-

ferred to in the foregoing Complaint and each of them was wholly without authority and jurisdiction to determine that the circular and advertising matter of plaintiff referred to in the foregoing Complaint was non-mailable and that the order and action of the said Postmaster General in issuing his "fraud order" in the premises is wholly void.

(d) That upon a hearing and final determination
20 of this matter, the defendant, his agents, servants and employees be temporarily and permanently restrained and enjoined from carrying out and enforcing the terms and conditions of the said "fraud order".

(e) That the "fraud order" be decreed to be unlawful and in violation of the Constitution of the United States and that same be vacated, annulled and set aside and decreed to be void and of no effect.

(f) That this Honorable Court exercise its jurisdiction over the parties and the subject matter of this Complaint and grant to plaintiff such other and further relief in the premises as the rights and equities of the cause may require.

SAMUEL D. CATES
Doing business as GLORY BEE PRODUCTS and GLORY BEE
By:
Frank E. and Arthur Gettleman
Edward Brodkey
Thomas F. Reilly
His Attorneys

10 S. La Salle Street
Ran. 6-6726

State of Illinois}
County of Cook} ss.

SAMUEL D. CATES being first duly sworn on his oath, deposes and says that he is plaintiff in the above-entitled complaint for injunction and other relief; that he knows the facts; that he has read the above and fore-
21 going Complaint and knows the contents thereof; that the same are true.

Samuel D. Cates

Subscribed and Sworn to before me this 29th day of August, A. D. 1950. Arthur Gettleman, Notary Public.

EXHIBIT A

POST OFFICE DEPARTMENT

Office of the Solicitor
Washington 25, D. C.
August 14, 1950.

* * (Caption—F. & L. Docket 19/9) * *

FINDING OF FACT AND RECOMMENDATIONS TO THE POSTMASTER GENERAL FOR THE ISSUANCE OF A FRAUD ORDER

There is set forth below the finding of fact and recommendation of the Trial Examiner in the above entitled case:

Finding of Fact and Recommendation of Trial Examiner

The complaint and notice of hearing were delivered to the respondent on March 13, 1950, in the manner provided by Rule 151.9. The hearing was conducted before me on March 22, 1950. The respondent was represented by counsel at that time who filed a written answer. Respondent was also permitted to file a brief which has been considered. The entire official record, including the transcript of proceedings, pleading and exhibits, is made a part hereof by reference.

23 The enterprise alleged to be in violation of the above statutes is averred in the complaint to be in substance the advertisement, and sale through the mails of products called "Glory Bee Fast Luck Brand Incense" and "Incense Numbers Tablets" under knowingly false and fraudulent representations to the effect:

a. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve the health of users;

b. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve the financial condition of users;

c. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve the social powers of users:

d. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will enable purchasers "to meet" their "obligations";

e. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will enable purchasers to obtain profitable employment;

f. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will "pep" up persons lacking in physical stamina;

g. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will accomplish "wonderful changes for the better" in the home of users;

h. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve "everything" in the lives of users, and

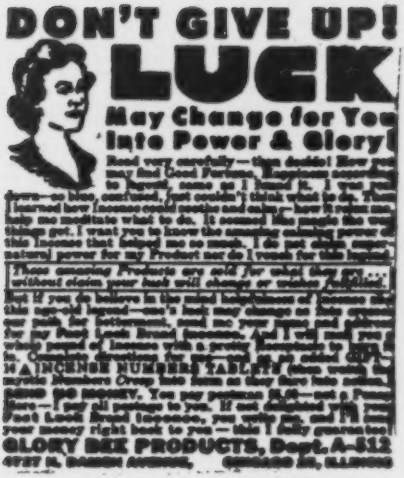
j. That the said "Incense Numbers Tablets", when used as directed, will produce numbers which will bring good "luck" to users.

The complaint further alleges that the operation of this enterprise is in violation of the terms of an affidavit executed on June 16, 1949, and filed wth the Solicitor of the Post Office Department by Alice Perkins of Chicago, Illinois.

A file of newspaper and periodical advertisements and a file of printed circular matter used by respondent to
24 advertise its products were received in evidence (Gov. Exs. 1, 2). Photostatic reproductions of this material are attached hereto as pages 4, 5, 6, 7 and 8:

...RIER'S ALMANAC FOR THE STATES OF NORTH CAROLINA, SOUTH CAROLINA, GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, TENNESSEE, LOUISIANA, TEXAS AND ARKANSAS - Atlanta, Georgia - Year 1950.

Govt. Exhibit 1-D



25

Every Letter and Excerpt of a Letter Printed Here Was Written to GLORY BEE. The Original Letters We Have on File Here in Our Office. Our Products Are Sold Only for What They Actually Are.

YOU BE THE JUDGE

READ Maybe You'll Be Convinced!

We produce these personal excerpts from users of Glory Bee FAST LUCK Brand Incense and here print their sincere, heartfelt emotions of thankfulness. Please read them, and then decide if you too, should try for better LUCK according to the belief and symbols of age-old legends, known and believed by a multitude of men and women—and often lonesome, unhappy souls.

F498—I have never used anything like GLORY BEE FAST LUCK Brand Incense in my life before. It gave me a revealing memory. It made me feel so much at Peace in mind and spirit. It looks like everything will work so well with me. I don't ever want to be without it as it is a wonderful Incense. I am telling my people about it. Send me another Pound by return of mail.

F496—I will write you these few lines to let you know how I am enjoying your wonderful Incense Powder. It is the best I ever used. I thank you for it. I gave me more power. I am getting along fine. Send me another POUND.

F484—My order of FAST LUCK Brand Incense with its added Gifts of Incense Burning numbers that came out in the mixture. I must tell you that I have been sick and so not able to write you that I feel lucky again to be about. May God bless you.

F485—Only a few lines to let you know I received my Goods from you all O.K. and am feeling much better now since using them and everything is just working out fine for me now and I do thank you so much for your kindness. As ever your friend.

F490—Very glad to get my shipment of FAST LUCK Brand Incense and the other Gifts it contained. Found it all to be just what you said it would be.

F497—I been aiming to write you before now. Don't think hard of me for not writing you sooner. I got the package you sent to me and everything in it is good for me. I think I am doing fine and feel lucky in all things.

F498—Please send me another Pound Package of FAST LUCK Brand Incense Powder. It is the best I ever tried. I am very much pleased. It was $5.00. Please ship C.O.D. and not a Penny more to Pay.

F499—The FAST LUCK Brand Incense is working fine for me. Thank you for it.

F456—I feel the best I ever have since I been in this world. I thank YOU very much for it.

F451—I am writing you to let you know how much I am enjoying your FAST LUCK Brand Incense. It is really good. I have recommended it to so many people that I have gotten you several customers. They are sending in their orders right away. The Numbers in the Incense comes right out. I just can't help but feel Luck is coming my way. You send this new order right away C.O.D. $5.00. Not a Penny More To Pay. And I am thanking you again.

F452—I am getting along fine and all my family seems to be doing better. We are enjoying the FAST LUCK Incense to the highest. I really do thank you from the bottom of my heart for writing it to us. Life is brighter and the home is more cheerful since using your Incense Powder and the Lucknutine Incense Tablets that burn out numbers. In every respect we are more happy and enjoy now made friends since I have been dealing with you—everything going better.

THESE TWO COLUMNS OF TESTIMONIALS

F459—I received the One Pound package of your FAST LUCK Brand Incense sometime ago and it has certainly given joy and much happiness to my little family and myself. So much so that I am sending for another POUND. The price was $5.00 and not a Penny More To Pay. Thanking you again.

F454—I am glad to say that I got very much satisfaction and such good results as I had hoped for from the FAST LUCK Brand Incense that you sent me a while ago. I like burning Incense, because it calms my mind and makes me sleep well. It does very wonderful for Home use, too. Send me another shipment of this Incense. Also, the Dream Book and the Candle Burning Book. I will be glad for you to use my name for Advertising your Goods.

F455—Your FAST LUCK Brand Incense is the best I ever used. One thing I want to know—how did you ever get my name and address? Anyway, it's no answer to my prayers. Thanks to the Incense for I believe it helped me so. You can see I love it, by me sending in for more. Send me my order as fast as the mails can bring it to me. Your customer.

F458—My dearest friend. Let me tell you how I feel and believe the FAST LUCK Brand Incense helped in my daily life and home. The quietness and the calmness that comes over me while burning the Incense, seems like a dark cloud has passed over and then I begin to see the light. It seems like every thing has gotten brighter to me. I can then relax. I can think better. I can't explain the feeling in words; but I thank God for giving me such help. Only God knows what I have been going through. I feel so much better now. Thanks again to you for the blessed FAST LUCK Brand Incense that has given me so much help.

F457—How I love to hear from you. I just feel I got a real friend. I have been very lonely. I have had a very hard life. When I got the letter you sent me which read—Don't give up! I said to myself,—I will try again. I will write you a nice long letter sometime and explain a lot of things. I sure have that peace of mind at home now and everything is quiet at home. I am using this FAST LUCK Brand Incense and maybe I want to send for something else, too.

F450—Just a few lines to let you hear from me. I ordered a Pound of your FAST LUCK Brand Incense a few weeks ago and I want you to know it sure made things change for me. I am very happy and I am lifted high in spirits, too. This is the best Incense I have ever used. I am telling all my friends about it. And, one of them is sending for a Pound today. I want to use it as long as I can get it. I cannot put in words how much I thank you for telling me about this wonderful Incense.

F459—Just a few lines to let you know I am very much in love with your FAST LUCK Brand Incense. Please send another package. I hope to hear from you soon.

F460—I have used some of the FAST LUCK Brand Incense and like its fragrance very much. I gave a friend some and she likes it too. I find that faith, hope and belief will change life for anybody.

F461—I am thanking you for the FAST LUCK Brand Incense. It has helped me so much. Before you told me about it—I was so worried, but ever since I got this Incense everything is O.K. and I want to thank you very much and I never shall forget you. Please send me another $5.00 order just as quick as you can.

F462—I was recommended to you by a friend. She told me about your FAST LUCK Brand Incense. Please send me one pound of the Incense by C.O.D. Mail. Total to pay $5. Not a Penny More.

F463—I really know for myself that you have the best quality of Incense. I would like very much to have another supply before my other gives out. So send it C.O.D. Total to pay $5. Not a Penny More.

F464—Please send me some more FAST LUCK Brand Incense. It has been very helpful. Be sure you send me the very same thing.

F465—I received the Incense and have been happy since I have been using it. I am very pleased and use it every nite.

F466—I received the FAST LUCK Brand Incense and I like it fine, and by the help of the Lord, I will send you another order again very soon.

F467—I have been so helped by my using your FAST LUCK Brand Incense. I just had to tell you of its wonderful effect on me. Everything has surely improved since using it. Thanks to you so much for getting in touch with me.

Try It—Try it your way! Decide for yourself what there is to these age-old beliefs and folklore traditions so dear to so many of us. Remember these products are only sold for what they actually are. We make no claim as to supernatural powers nor do we claim your luck will change or that your wishes will be fulfilled.

Govt. Exhibit [illegible]

THOUSANDS SAY TO YOU!

I HAVE BECOME RICH In Real Happiness!

DON'T YOU GIVE UP!

YOUR LUCK MAY CHANGE According to Age-Old Beliefs...Into Success, Home Contentment and LOVE!

I HAVE UNCROSSED BAD CONDITIONS!

The SOCIAL MAJESTY THAT OFTEN ACCLAIMS OUR HOPES IN LOVE AND ROMANCE

LET POWER and GLORY BE OUR AIM FOR EVER and EVER!

Your experience may not be the same as those users. Remember we sell our incense only for what it actually is. We absolutely make no supernatural claims for our products. We make no claims that your luck will change or that your wishes will be fulfilled. We do Guarantee the Full Value of our Products or refund your money if you are not delighted. Send your order in TODAY!

GLORY BEE PRODUCTS

F474—Just a word of thanks to you. There has been wonderful changes for the better in my home since I have been using your FAST LUCK Brand Incenses. Thanks, to GLORY BEE Products.

F475—I received so much satisfaction from your FAST LUCK Brand Incense Powder that I ordered from you. I am well pleased with it and it cannot be beat. I also gave your address to some of my friends which you will hear from very soon.

F476—The FAST LUCK Brand Incense sure did help in many ways,—especially in concentrating my mind on my health. I therefore have been lots better, feeling better since using this good Incense. Even in money matters I have been able to figure it out better. I have been able to go to Church this year. Many thanks to you and I am sending for another order of FAST LUCK Brand Incense.

F477—Please send me a Pound of your FAST LUCK Brand Incense. I have tried it before and it is really wonderful. I hope to hear from you soon.

F478—I have used your FAST LUCK Brand Incense and I am really pleased. Send another POUND of it to me right away. C.O.D. $5. NOT A PENNY MORE TO PAY.

F479—My husband and I used your FAST LUCK Brand Incense and it seemed to help our Spirit rising very, very, very much. Anyway, I have a job with the American Woolens as a Clerk that pays at the end of each month. I will try to keep bright and cheerful and keep it. My husband has been out of work about a year. This week he got a good job. So we pray and hope we will get all our bills paid. Thanking you.

F480—Please send me another package of FAST LUCK Brand Incense. I enjoy it fine. It is the best I have ever used.

F481—I have used your Product the FAST LUCK Brand Incense and I like it very much. So I am asking you please rush me a POUND of it. I pay Postman $5. No More. Just $5.

F491—I have tried your FAST LUCK Brand Incenses and must say I have been much pleased with its results. Kindly send me another pack for $5.

CED

Govt. Exhibit 9-C-1

GLORY BEE PRODUCTS

4727 N. DAMEN AVE., CHICAGO 25, ILL.

These amazing PRODUCTS are sold to you for what they actually are — without claim your luck will change or wishes fulfilled.

Don't Give Up!
Your Luck May Change
Into Power and Glory!

Have Hope and Faith.

My Dear Friend:

This Message may be for you! Read very carefully. Get its full meaning and intent. Note, I don't claim any supernatural powers in luck. But, nevertheless,—here is My Story based solely on age-old legend—that one's luck may change as fate crosses our path for betterment. So, if you do believe in LUCK—read further—then decide what to do.

Therefore, I say to you. Don't give up! Your Luck may change. You may find good fortune and happiness yet. If you are discouraged and feel spiritually low at this time,—it behooves you to heed the words in this Message, because this bit of encouragement may help you immensely toward success and happiness.

I was so real down—so blue—so tense—so low, so terribly confused, that I just couldn't think what to do. I was all ready to give up and just let things go as they pleased,—and not make any effort at all to change these crossed conditions.

Then I learned from an old Book on FOLKLORE, the mystic meanings, fantasies and age-old beliefs on good and bad luck. And, how INCENSE could soothe and calm—how it could relax me and help me gather my thoughts together and meditate just what to do.

Well, it seemed just like magic the way things got. Maybe your luck can change too! Will you try it my way for just 7 days? Will you try to be imaginative with me, hopeful and exert your faith, your spirit for Good to come to you in happiness, Love, Romance, Social Success and a contented Home Life!

over—

GED MAR 21 1950

Just return the Order Form with your name and address in my Personal Envelope. I will mail you a whole Pound of this FAST LUCK Brand INCENSE. With complete directions for use—

And more, much more,--as an Extra Gift, absolutely FREE of Extra cost--a very pretty Receptacle to burn the Incense in—

And as an added SPECIAL GIFT—I include in your package—16 △ INCENSE NUMBERS TABLETS—then watch those Mystic Numbers creep out into form as the Tablets flare into action. They may bring you LUCK! You will really be delighted with your FAST LUCK Brand INCENSE that I feel sure. You just write me right back. I want to be honest with you.

It is amazing how many of us continue to this day—our fantasy in the legend of age-old beliefs in good and bad luck. If you believe in LUCK, try it for a period of 7 days. Prove to yourself the Power and satisfaction of FAST LUCK Brand INCENSE.

Now here is my GUARANTEE!—If you cannot report to me complete satisfaction and delight in 7 days with my Fast Luck Brand Incense and Incense Number Tablets—you can have your purchase price back immediately! I don't want your money if you are not delighted and completely satisfied..

The Ancients used Incense for Power and Glory in calmness--clearer thinking--to achieve greater happiness in Love, Romance, Money and a Contented Home Life. We make no claims regarding the veracity of such legends. We sell our products only for what they actually are! Money Refunded if not delighted.

I send you good wishes--good luck--and urge you to return the ORDER FORM as fast as the mails can bring it to me--and I will start your FAST LUCK Brand INCENSE and INCENSE TABLET NUMBERS right back to you--quick!

Your friend in need,

Glory Bee

GLORY BEE PRODUCTS

GB/K

Govt. Exhibits

Govt Exhibit 2-C-2

GIVEN FOR PROMPTNESS **GIVEN**

This Smart BOOK

Magic Power of NUMBERS

"The tremendous interest of late in Names and Numbers. The study of Numerology opens a hidden world of self-analysis, often a reason for apparent success or failure. Here is a Booklet of vast interest for the Student, or it can well serve as a means of good Entertainment. It would be my hope and wish that you use these POWERS for your self-advancement in Money, Love and Happiness."

LEWIS deCLAREMONT, Author

Your Reward

GLORY BEE PRODUCTS

CED MAR 21 1950

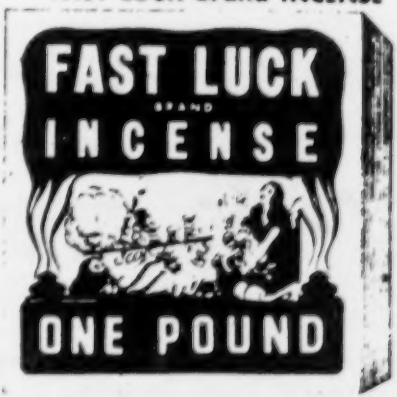
Govt. Exhibit 2

Govt. Exhibit 2-C-3

16 ▲ INCENSE LUCKY NUMBERS TABLETS

WATCH THE NUMBERS CREEP OUT—THEY MAY BRING LUCK

1 FULL POUND OF FAST LUCK Brand INCENSE



COMES WITH IT—EXTRA!

A VERY PRETTY RECEPTACLE TO BURN YOUR FAST LUCK BRAND INCENSE IN

All 3 Above Products – $5.00 – Don't Pay a Penny More!

CED MAR 21 1950

Govt. Exhibit c

Govt. Exhibit 2-C-8

Mail This Back To Me--Today SURE!

ORDER FORM FOR

GLORY BEE PRODUCTS
4727 N. Damen Ave.
Chicago 25, Illinois

I will give your Method 7 Days Trial. If I am not delighted, I will return the unused portion and ask for my money back. I will pay only $5.98 on delivery. This includes everything. Not a penny more to pay.

NAME _____

ADDRESS _____

CITY _____

P. S. REMEMBER—you pay Postman $5.98 (16 A [illegible]) plus C.O.D. and the Money Order charges. If you [illegible] your $6.00 with your Order NOW. Postal charges are higher this year. Hurry your order to me if you can NOW. Thanks very much here—GLORY BEE. Guaranteed or [illegible] we make no claims your luck will change or wishes fulfilled.

33 A written statement showing the composition of respondent's incense and "Lucky Numbers Tablets" was received in evidence as Government Exhibit 3, together with samples of these preparations and "directions" for use as parts of Government Exhibit 4.

The "Fast Luck Brand Incense" consists simply of aromatic oil and coloring in a sawdust base; the "Numbers Tablets" are composed of an aromatic oil in a charcoal base containing numbers made of ink saturated with copper sulphate, which appear when the tablets are ignited. Respondent charges $5 for these products.

It is shown in the record (R. 10, 16) that these products are the same as those sold in an earlier case (F. & L. Docket 18/5), which involved a "lucky incense" mail order enterprise operated in the name of Alice Perkins, who has been for some years an employee of the operator of the enterprise here under consideration, Samuel D. Cates. Under Rule 151.15(d) of the Rules of Practice I take official notice of the records in that case, including the transcript of proceedings.

The evidence in both the Perkins case and the present case shows that Cates has for some time operated a business under the name of Standard O & B Supply Company, selling by mail on a large scale a variety of incense, lucky talismans, lode stones, magic herbs and the like (see also Gov. Ex. 4-A-B). This business and the enterprise here under consideration are operated from the same address, which is likewise the address from which Alice Perkins operated her aforesaid enterprise. This evidence further

34 shows that Cates and Alice Perkins in January, 1949, joined to instigate as a branch or department of the Standard O & B Supply Company, the sale of the "Fast Luck Brand Incense" and "Numbers Tablets," using the name of Alice Perkins for that purpose; that on June 16, 1949, following issuance of a fraud order complaint directed against Alice Perkins alleging the conduct of a scheme to defraud by Perkins in the operation of that business, and subsequent to hearing on the complaint, Perkins was permitted to execute and file with the Post Office Department an affidavit of discontinuance as a basis for disposing of the charges in that case in lieu of further proceedings; and that Cates was aware of the execution and filing by his employee of that affidavit. The evidence shows that Cates began the mail order enter-

prise at issue here, involving the sale of the same products, on or about June 1, 1949 (R. 11), and that Alice Perkins was then, and at the time of this proceeding continued to be, in his employ (R. 12). It is further shown that the incense and numbers tablets sold in this case are ordinary commercial products manufactured by, and procured by respondent in bulk from, Chicago concerns, and that they possess no properties not possessed by any other ordinary incense generally (Perkins Tr. 15; Glory Bee Tr. 10).

Testimony in both the Perkins and present case shows that Perkins and Cates are well aware of the superstitious beliefs held by many people with respect to the mystical efficacy and good luck potentials of incense and related curios, including the miscellany sold by Cates in the Standard O & B enterprise, and that the advertising literature in the Perkins case was designedly worded and composed so as to appeal to persons possessing such beliefs (Perkins Tr. 15, 16, 17; also Glory Bee Tr. 13). Cates' employee freely disavowed her own personal belief in these superstitions (Perkins Tr. 15, 16).

Cates, when interviewed by the post office inspector who investigated this case, would not state definitely, one way or the other, whether he himself did or did not believe in such things (R. 13). However, considering the background against which Cates and Perkins joined to launch the Perkins enterprise, and their commercial motives in so doing, as well as other facts and circumstances of record, and inferences to be reasonably drawn therefrom, it would be foolish and unrealistic to assume that, as a matter of fact, Cates does possess any such belief. In fact, in the case before me, respondent was willing to concede at the hearing that the incense would not cure any diseases, chronic or otherwise, or improve the health of users thereof, leaving out the mental aspect (R. 21, 22).

The respondent contends in his brief that he is doing no more than selling his incense for what it is, without misrepresenting it in any way, and calls attention to the various disclaimers of any supernatural power for his incense, which appear here and there in the periodical and newspaper advertisements and printed circulars. The respondent relies heavily upon Dolan *v.* Hurley, 283 F. 695 (affirmed 297 Fed. 825), which held that so-called "lucky

stones" could lawfully be sold through the mails if sold "for what they are, without lying about them." Respondent contends that he is doing no more than selling his incense for exactly what it is.

Upon the basis of a careful examination of the contents of respondent's advertisements and printed circulars, and considering the class of persons to whom they will
36 and obviously are designed to appeal, and the effects which advertisements of this kind will most probably produce on their minds, I am unable to agree with this and other contentions raised in respondent's brief.

Respondent Cates, whose lack of belief in the mystical luck bearing properties of his incense may be fairly and reasonably deduced as a fact not only from the circumstances previously alluded to, but from the wording of the disclaimers themselves, goes much further in his representations and advertising statements than simply to offer his products for what they actually are, namely, and as he well knows, ordinary, non-supernatural, commercial brand incense. The periodical advertisements are headlined in eyecatching black type, much larger than that which follows, with the admonition, "Don't Give Up! Luck May Change For You Into Power and Glory!" This reassurance is immediately fortified by use of language purporting to be the narrative in the first person of a user of respondent's incense. With this incense, so the narrative goes, "You may find Good Fortune, Happiness according to legend, the same as I found it." "It seemed like magic the way things got." By these and other adroitly turned phrases, the accuracy of the "legend" is thus vouched for; and it is reasonable to assume that the "power-" and luck-hungry readers of these advertisemnts will pay little or no attention to the disclaimers, one of which, even while attempting to disclaim, nevertheless, and in tenor with the lead-off promises, describes respondent's products as being "amazing."

37 The same heart-warming assurances of good fortune and change of luck for the better are repeated in respondent's printed circulars, as examination of their photostatic reproductions attached hereto will show. Again, what undoubtedly will impress and what is intended to impress the mind of the superstitious reader of these circulars, to a degree far beyond the power of the interspersed disclaimers to minimize or erase, are the

numerous testimonials printed in one of these circulars whch respondent refers to as "personal excerpts from users of Glory Bee Fast Luck Brand Incense," containing "their sincere, heartfelt emotions of thankfulness."

These testimonials in purport and effect attribute to use of respondent's incense such results as better health (F495, 476, 450), improved financial conditions (F476, 479), "power" to meet family obligations (F473), "wonderful changes for the better" in the family home (F474), the obtaining of profitable employment (F479), improved social power (F468), peace in the home (F473), and the acquisition of new "pep" (F490). The lucky number incense is also accredited with doing its own part in bringing luck, cheer and good fortune to the users (F451, 452). At other places in the advertising readers are told that, with respect to the numbers incense, "you will be amazed," and "watch the numbers creep out—they may bring you luck."

Thus, this respondent by these advertising devices vouches throughout his advertising literature for the validity of the "legend" and endorses it as worthy of belief.

He misleads his superstitious readers to believe that
38 the "legend" is reality, and offers for sale the instrumentalities by means of which he shows this has been and can be accomplished. He invites the readers of the testimonial advertising sheet to "Be The Judge" of what they read and "Maybe You'll Be Convinced!" He actively seeks to convince them. In the midst of making "no claims that your luck will change or wishes will be fulfilled" (reverse side of testimonial sheet) he nevertheless guarantees "the Full Value of our Products or refund your money if you are not delighted." The testimonials and other advertising assurances serve the purpose of demonstrating to the reader what respondent means by "Full Value" of his products, and what the purchaser may expect to experience in the way of "delight" from them.

In contriving these advertisements and printed circulars, respondent has taken great pains to insure that his disclaimers will exert only negligible effects, if any at all, upon the minds of his credulous readers. He has gone to great lengths not to permit his patrons to believe that he is selling his incense simply for what it actually is.

He has composed advertisements well calculated to deceive and defraud the ignorant, the credulous and the superstitious.

Respondent's advertising claims for his incense are completely opposed to common knowledge and experience. Their falsity may be inferred from their preposterous character. Respondent having designedly prepared his advertising literature so as to prey upon the superstitious beliefs of ignorant people, his fraudulent purpose to deceive them is self-evident.

39 I find from the evidence before me that respondent in the operation of this scheme, is making in substance and effect the representations complained of, with knowledge of their falsity and of their capacity to deceive and mislead that class of persons to whom they are primarily directed; and that such statements materially misrepresent the value of respondent's incense, its efficacy and the benefits to be derived from use thereof. I, therefore, recommend that a fraud order issue against Glory Bee Products, Glory Bee, and their officers and agents as such, at Chicago, Illinois.

(Signed) James C. Haynes, Jr.
Senior Trial Examiner.

After a review of this case, I approve and adopt the foregoing finding of fact and recommendation of the Senior Trial Examiner.

(Signed) Frank J. Delany
Solicitor.

40 EXHIBIT B.

POST OFFICE DEPARTMENT
Washington

Order No. 43833 Aug 16 1950

It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that Glory Bee Products, Glory Bee, and their officers and agents as such, at Chicago, Illinois are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of sections 259 and 732 of title 31, United States Code, said evidence being more fully described in the finding of fact of the Solicitor for the Post Office Department of the date of August 14, 1950, and said finding being hereby adopted as the finding of the Postmaster General, and by authority vested in the Postmaster General by said laws the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concerns & parties and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters whether registered or not, and other mail matter which shall arrive at your office directed to the said concerns & parties to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the appropriate dead letter branch with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

(Signed) J. M. Donaldson
Postmaster General.

(Case No. 78350-F)
To the Postmaster.
Chicago, Illinois.

41 And afterwards on, to wit, the 31st day of August, 1950 came the Plaintiff by his attorneys and filed in the Clerk's office of said Court his certain Notice in words and figures following, to wit:

42

IN THE
UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

NOTICE

To:

Hon. John Haderlein,
Postmaster of the City of Chicago
in the County of Cook and State of Illinois
Postoffice Building
Chicago, Illinois.

Please Take Notice that on Thursday, the 31st day of August, 1950, at the opening of court in the forenoon or as soon thereafter as counsel can be heard, we shall appear before his Honor, Judge Michael L. Igoe, or in his absence before such other Judge as may be then and there sitting in his place and stead or hearing matters of this nature, in the courtroom usually occupied by him as such in the U. S. Court Building, Chicago, Illinois and shall then and there move the court to enter a preliminary injunction and temporary restraining order against you, and in support of said motion shall read from the verified Complaint, a copy of which is hereto attached and herewith served upon you.

At which time and place you may appear, if you so see fit.

Frank E. & Arthur Gettleman
Edward Brodkey
Thomas F. Reilly
Attorneys for Plaintiff

Received a copy of the above and foregoing Notice, together with a copy of the Complaint hereto attached this 30th day of August, 1950 at 1:25 P.M.

John Haderlein, Postmaster
per BEW

43 And on the same day, to wit, on the 31st day of August, 1950 being one of the days of the regular August term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

44

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

It Is Ordered by the Court that the motion for temporary restraining order and preliminary injunction be and it is hereby set for hearing on September 5, 1950.

45 And afterwards, to wit, on the 5th day of September, 1950 being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

46

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

It Is Ordered by the Court that the motion of the plaintiff for a temporary restraining order be and it is hereby continued to September 19, 1950 and that the defendant be and is hereby given two (2) weeks within which to answer complaint.

47 And afterwards on, to wit, the 7th day of September, 1950 there was filed in the Clerk's office of said Court a certain Summons With Marshal's Return Endorsed Thereon in words and figures following, to wit:

48

UNITED STATES DISTRICT COURT
For the
Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

To the above named Defendant:

You are hereby summoned and required to serve upon Frank E. & Arthur Gettleman, Edward Brodkey and Thomas F. Reilly, plaintiff's attorneys, whose address is 10 South La Salle Street, Chicago, Illinois, an answer to the complaint which is herewith served upon you, within Sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Roy H. Johnson
Clerk of Court.
E. A. Wagner
Deputy Clerk.

Date: August 30th, 1950.

49 RETURN ON SERVICE OF WRIT

Northern District of Illinois
U. S. Marshal's Return

Served this writ, together with copy of complaint, on the United States of America, by and through Otto Kerner, Jr., United States Attorney for the Northern District of Illinois at Chicago, Illinois, by leaving copies thereof for him at Room 450, U. S. Courthouse, Chicago, Illinois, his usual place of business with Gordon S. Morgan, Chief Clerk, an agent authorized to accept service for him at the same time informing him of the contents thereof, this 5th. day of September, 1950.

And by delivering a copy of this writ, together with copy of complaint, to the within named John Haderlein,

as Postmaster of the City of Chicago, in the County of Cook and State of Illinois, by leaving said copies thereof for him at Room 414 New Post Office Building, Canal and Van Buren Streets, Chicago, Illinois, his usual place of business, with Otto Orth, in charge of Public Relations Office, authorized to accept service, at the same time informing him of the contents thereof, this 5th. day of September, 1950.

And by forwarding by Registered Mail (Register No. 870177) this 5th. day of September, 1950, a copy of said writ, together with copy of complaint, to the Attorney General, Washingon 25, D. C.

And by forwarding by Registered Mail (Register No. 870178) this 5th. day of September, 1950, a copy of said writ, together with copy of complaint, to the Postmaster General, Washington, D. C.

By Wm. Raff
William G. Raff, Deputy U. S. Marshal

T. P. O'Donovan, United States Marshal

1 Ser 2.00
4m .24

2.24

No. 50 C 1220
United States District Court
For the
Northern District of Illinois
Samuel D. Cates, as etc.
Plaintiff
v.
John Haderlein, Postmaster
Defendant

SUMMONS IN CIVIL ACTION

Returnable not later than 60 days after service
Frank E. & Arthur Gettleman
Edward Brodkey and Thomas F. Reilly
Attorneys for Plaintiff.
10 S. LaSalle Street,
Rand. 6-6726
Chicago, Illinois.

50 *And afterwards on, to wit, the 19th day of Sep-*
tember, 1950 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Answer in words and figures following, to wit:

51

IN THE
UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

ANSWER OF DEFENDANT

Defendant, by his attorney, Otto Kerner, Jr., United States Attorney at Chicago, Illinois, makes answer to the complaint herein and says:

First Defense

The Complaint fails to state a cause of action against defendant upon which relief can be granted.

Second Defense

(1) Defendant admits the jurisdiction of the court but denies injury to plaintiff as averred in paragraphs 1 and 2 of the complaint.

(2) Defendant admits that he has executed the provisions of fraud order numbered 43833 issued by the Postmaster General on August 16, 1950, certified copy whereof is attached hereto, and that defendant will continue to execute the provisions of said order unless restrained by order of this honorable court, and that said enforcement of the Postmaster General's order will interfere with plaintiff's use of the mails for the sale of "Glory Bee FAST LUCK Brand Incense" and similar things which the Postmaster General found and determined and stated to defendant in said order to constitute a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of Sections 259 and 732 of Title 39, United States Code, said scheme being more fully described in the Finding of Fact and Recommendations To The Postmaster General For The Issuance Of A Fraud Order, certified copy whereof is attached hereto as an

52 exhibit. And defendant denies the allegations of paragraph 3 of the complaint to the effect that plaintiff will be damaged by the enforcement of said order but on the contrary avers that irreparable injury will be suffered by the public and particularly by persons who will be deceived and defrauded by plaintiff's advertisements of lucky incense and similar superstitious nostrums unless the aforesaid fraud order of the Postmaster General is fully enforced against the fraudulent scheme which plaintiff was conducting and seeks to continue through the mails.

(3) Defendant admits the allegations of paragraph 4 of the complaint as to the residence of plaintiff.

(4) Defendant admits the allegations of paragraphs 5, 6, 7 and 8 of the complaint.

(5) Defendant admits the allegations of paragraph 9 of the complaint, except that he denies that plaintiff is entitled to any relief from the order of the Postmaster General aforesaid.

(6) Defendant denies the allegations of paragraph 10, including sub-paragraphs one to thirty-33, inclusive, insofar as they purport to aver matters of fact, and insofar as they are conclusions of law, arguments and conclusions of the pleader, defendant is advised that he is not required to answer them, but states nevertheless that they are erroneous, incorrect and misleading, and, further answering said paragraph 10 of the complaint, avers that the true facts with respect to the matters mentioned therein are set forth in the "Finding of Fact and Recommendations To The Postmaster General For The Issuance Of A Fraud Order," certified copy whereof is attached hereto.

Third Defense

Defendant avers that the evidence before the Postmaster General, as set forth in the Finding of Fact aforesaid, plainly and unmistakably spells out a scheme to obtain money through the mails by means of false and fraudulent pretenses, representations and promises with respect to certain so-called "Fast Luck Brand In-
53 cense" and "Lucky Numbers Tablets" contained in advertisements widely circulated throughout the country and designed and intended to secure remittances of money

through the mails from persons who plaintiff well knew would be deceived by the attribution of magic, supernatural and extraordinary powers and qualities to his worthless merchandise, in which attributed and advertised qualities plaintiff himself did not believe and his employee, Alice Perkins, had previously been warned and proceeded against by the Post Office Department concerning the sale of similar things whereof plaintiff was fully advised but chose to ignore such advice and warning and to pursue the scheme under the names Glory Bee Products and Glory Bee to the injury of the public as aforesaid.

Wherefore, having fully answered the complaint herein, defendant respectfully prays this honorable court that this suit be dismissed and that defendant go hence without day and that plaintiff be ordered to pay all costs of this action.

Otto Kerner, Jr.
Otto Kerner, Jr.,
United States Attorney,
Representing Defendant.

54

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
• • (Caption—No. 50 C 1220) • •

AFFIDAVIT OF DANIEL J. KELLY, CHIEF TRIAL EXAMINER OF THE POST OFFICE DEPARTMENT OF THE UNITED STATES.

United States of America }
District of Columbia } ss:

The undersigned, Daniel J. Kelly, being first duly sworn, says:

That he is now and during all of the time mentioned hereinafter has been the Chief Trial Examiner of the Post Office Department of the United States and that the facts herein recited are known to him in his official capacity and as matters of record in the Office of the Solicitor of the Post Office Department.

That on March 6, 1950, there was forwarded to the postmaster at Chicago, Illinois, for delivery to Glory Bee Products a complaint certified copy of which is attached hereto, together with a notice of hearing of which certified copy is also attached hereto; advising said Glory Bee Products that it was charged with obtaining and attempting to obtain money through the mails by means of certain false and fraudulent pretenses, representations and promises more fully set out in the aforesaid complaint, in violation of 39 U. S. Code 259 and 732; that a hearing would be held concerning the charges in said complaint on March 22, 1950, and that answer to such charges should be filed with the Solicitor, Post Office Department, on or before March 17, 1950.

55 That said complaint and notice of hearing were transmitted to the postmaster at Chicago, Illinois, together with a letter of instructions directing him as to whom and in what manner in which delivery of said complaint and notice of hearing should be made to Glory Bee Products, a copy of said instructions being also attached hereto.

That under date of March 15, 1950, the aforesaid postmaster at Chicago, Illinois, addressed a letter to the Office

of the Solicitor of the Post Office Department reporting delivery of the aforesaid complaint and notice of hearing and transmitting therewith the receipt therefor received by him and signed by M. Koche, manager of Glory Bee Products Co., copies of which are also hereto attached.

Thereafter Frank E. and Arthur Gettleman, attorneys at Chicago, Illinois, on behalf of Glory Bee Products, filed a written answer to the complaint, said answer being dated March 16, 1950. Certified copy of said answer is also attached to this affidavit.

That on March 22, 1950, there was convened before the Senior Trial Examiner a hearing with respect to the charges of fraudulent use of the mails set forth in the aforesaid complaint at which time Frank E. Gettleman, attorney on behalf of Glory Bee Products appeared and participated in the hearing. That during the course of said hearing, certain evidence was adduced through witnesses presented by the Government including the post office inspector who investigated the use of the mails by this enterprise and also by an expert medical witness who testified with respect to certain of the allegations in the complaint. These witnesses were subjected to cross examination by Frank E. Gettleman, attorney for Glory Bee Products, but said attorney offered no testimony or evidence of any kind on behalf of the said Glory Bee Products. Testimony and documentary evidence offered by the Government is the only evidence before the Post Office Department concerning the matters in dispute.

56 That thereafter the Trial Examiner who heard this case, prepared a finding of fact, reviewing the evidence and recommended the issuance of a fraud order against Glory Bee Products and Glory Bee at Chicago, Illinois. This finding of fact with a transcript of testimony and other matters were reviewed by Roy C. Frank, Associate Solicitor, Post Office Department, on behalf of Frank J. Delany, Solicitor of the Post Office Department, and, after such review the finding of fact was approved by said official. Said finding of fact, together with the transcript of testimony and other matters, were transmitted on behalf of the Solicitor of the Post Office Department to the Postmaster General, who, upon evidence satisfactory to him, issued Fraud Order No. 43833 dated August 16, 1950, against Glory Bee Products and Glory Bee, which

said fraud order is now the subject of a suit before this honorable court. Certified copies of said finding of fact and fraud order are attached hereto.

Daniel J. Kelly,
Chief Trial Examiner
Post Office Department
of the United States.

Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 11th day of September, 1950.

Charlotte B. Stillwell
Notary Public

My commission expires 2-1-53.

57

POST OFFICE DEPARTMENT
Washington

September 1, 1950.

I certify that the annexed papers are true copies of the original documents on file in this Department.

In testimony whereof, I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the City of Washington, the day and year above written.

V. C. Burke
Acting Postmaster General of the
United States of America.

58

POST OFFICE DEPARTMENT
Office of the Solicitor
Washington 25, D. C.

March 6, 1950

* * (Caption—F. & L. Docket 19/9) * *

COMPLAINT

The undersigned has probable cause to believe that, under the names set forth in the above caption (hereinafter referred to as the respondent) there is being conducted a scheme for obtaining money through the mails by means of pretenses, representations and promises, which are knowingly false or fraudulent, in violation of Sections 259 and 732 of Title 30 U. S. Code, and in support of such belief alleges as follows:

(1) That said respondent is and for some time has been obtaining and attempting to obtain remittances of money through the mails in the sale of products called "Glory Bee Fast Luck Brand Incense" and "Incense Numbers Tablets" as more fully hereinafter set forth.

(2) That public attention is attracted to said scheme by means of printed circular matter sent through the mails to various addressees in this country and which is calculated and designed to induce the readers thereof to purchase the said products through the mails.

59 (3) That included among the representations contained in said circular matter are the following statements appearing in a circular letter headed "Glory Bee Products,"—"Don't Give Up! Your Luck May Change Into Power and Glory!"

> This Message may be for you! Read very carefully. Get its full meaning and intent. Note, I don't claim any supernatural powers in luck. But, nevertheless,—here is My Story based solely on age-old legend—that one's luck may change as fate crosses our path for betterment. So, if you do believe in LUCK—read further—then decide what to do.
>
> Therefore, I say to you. Don't give up! Your Luck may change. You may find good fortune and happiness yet. If you are discouraged and feel spiritually low at this time,—it behooves you to heed the

words in this Message, because this bit of encouragement may help you immensely toward success and happiness.

I was so real down—so blue—so tense—so low, so terribly confused, that I just couldn't think what to do. I was all ready to give up and just let things go as they pleased,—and not make any effort at all to change these crossed conditions.

Then I learned from an old Book on FOLKLORE, the mystic meanings, fantasies and age-old beliefs on good and bad luck. And how INCENSE could soothe and calm—how it could relax me and help me gather my thoughts together and meditate just what to do.

Well, it seemed just like magic the way things got. Maybe your luck can change too! Will you try it my way for just 7 days? Will you try to be imaginative with me, hopeful and exert your faith, your spirit for Good to come to you in happiness, Love, Romance, Social Success and a contented Home Life!

And as an added SPECIAL GIFT—I include in your package—16 INCENSE NUMBERS TABLETS —then watch those Mystic Numbers creep out into form as the Tablets flare into action. They may bring you LUCK! You will really be delighted with your
60 FAST LUCK Brand INCENSE that I feel sure. You just write me right back. I want to be honest with you.

It is amazing how many of us continue to this day—our fantasy in the legend of age-old beliefs in good and bad luck. If you belive in LUCK, try it for a period of 7 days. Prove to yourself the Power and satisfaction of FAST LUCK Brand INCENSE.

Now here is my GUARANTEE!—If you cannot report to me complete satisfaction and delight in 7 days with my Fast Luck Brand Incense and Incense Number Tablets—you can have your purchase price back immediately! I don't want your money if you are not delighted and completely satisfied.

* * *

In another advertising circular employed in this enterprise headed "Every Letter and Excerpts of a Letter Printed Here was Written to GLORY BEE" etc., the following statements appear:

Every Letter and Excerpt of a Letter Printed Here was Written to GLORY BEE. The Original Letters We Have on File here in Our Office. Our products Are Sold Only for What They Actually Are.

Picture	YOU	READ
of	BE THE	Maybe You'll Be !
A Judge	JUDGE	Convinced

We produce these personal excerpts from users of Glory Bee FAST LUCK Brand Incense and here print their sincere, heartfelt emotions of thankfulness. Please read them, and then decide if you too, should try for better LUCK according to the belief and symbols of age-old legends, known and believed by a multitude of men and women—and often lonesome, unhappy souls.

• • •

F494—My order of FAST LUCK Brand Incense with its added Gifts of Incense burning numbers that came out in the ashes. I must tell you that I have been sick and so not able to write you that I feel lucky again to be about. May God bless you.

F495—Only a few lines to let you know I received my Goods from you all O.K. and am feeling much better now since using them and everything is just working out fine for me now and I do thank you so much for your kindness. As ever your friend.

F496—Very glad to get my shipment of FAST LUCK Brand Incense and the other Gifts it contained. Found it all to be just what you said it would be.

61

• • •

F451—I am writing you to let you know how much I am enjoying your FAST LUCK Brand Incense. It is really good. I have recommended it to so many people that I have gotten you several customers. They are sending in their orders right away. The Numbers in the Incense comes right out. I just can't help but feel LUCK is coming my way. You send this new order right away C.O.D. $5.00. Not a Penny More To Pay. And I am thanking you again.

• • •

F467—I have been so helped by my using your FAST LUCK Brand Incense I just had to tell you

of its wonderful effect on me. Everything has surely improved since using it. Thanks to you so much for getting in touch with me.

• • •

Try it—Try it your way! Decide for yourself what there is to these age-old beliefs and folklore traditions so dear to so many of us. Remember these products are only sold for what they actually are. We make no claim as to supernatural powers nor do we claim your luck will change or that your wishes will be fulfilled.

DON'T YOU
GIVE
UP!

THOUSANDS
SAY TO
YOU!
I HAVE BECOME
RICH In Real
Happiness!

YOUR LUCK
MAY
CHANGE
According to
Age-Old Beliefs . . .
Into Success, Home
Contentment
and
LOVE!

HAVE
UNCROSSED
BAD
CONDITIONS!

The
SOCIAL
MAJESTY
THAT OFTEN
ACCLAIMS OUR HOPES IN
LOVE AND ROMANCE

LET POWER and
GLORY BE OUR
AIM FOR EVER
and
EVER!

62 F476—The FAST LUCK Brand Incense sure did help in many ways,—especially in concentrating my mind on my health. I therefore have been lots better, feeling better since using this good Incense. Even in money matters I have been able to figure it out better. I have been able to go to Church this year. Many thanks to you and I am sending for another order of FAST LUCK Brand Incense.

F479—My husband and I used your FAST LUCK Brand Incense and it seemed to help our Spirit rising very, very, very much. Anyway, I have a job with the American Woodmen as a Clerk that pays at the end of each month, I will try to keep bright and cheerful and keep it. My husband has been out of work about a year. This week he got a good job. So we pray and hope we will get all our bills paid. Thanking you.

(4) That through the said circular advertising matter containing the above set forth statements and representations, and words of a similar character not specifically set forth at length herein, the respondent has been and is representing to the public in substance and effect:

a. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve the health of users;

b. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve the financial condition of users;

c. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve the social power of users;

d. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will enable purchasers "to meet" their "obligations";

e. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will enable purchasers to obtain profitable employment;

f. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will "pep" up persons lacking in physical stamina;

g. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will accomplish "wonderful changes for the better" in the home of users;

h. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve "everything" in the lives of users, and

j. That the said "Incense Numbers Tablets", when used as directed, will produce numbers which will bring good "luck" to users.

(5) That such statements are false and fraudulent and materially misrepresent the value of said products, their efficacy and the benefits to be obtained from the use thereof.

It is further charged that the operation of the enterprise as set forth herein is in violation of the terms of the affidavit executed on June 16, 1949, and filed with the Solicitor of the Post Office Department by Alice Perkins of Chicago, Illinois.

Therefore, under the provisions of Rule 151.7 of the Rules of Practice, it is recommended that the Postmaster General issue a fraud order against Glory Bee Products, Glory Bee, and their officers and agents as such at Chicago, Illinois.

/s/ Louis J. Doyle
Chief of the
Fraud Section.

To the Solicitor
Of the Post Office Department.

64

POST OFFICE DEPARTMENT
Office of the Solicitor
Washington 25, D. C.

March 6, 1950

* * (Caption—F. & L. Docket No. 19/9) * *

NOTICE OF HEARING

A complaint, duplicate original of which is attached having been filed in this office pursuant to the Rules of Practice, a copy of which Rules is enclosed, which complaint recommends the issuance of a fraud order against the above-named:

And it appearing that prior to the taking of any action by the Postmaster General, that a full and fair hearing is required for the purpose of determining whether the allegations in the complaint are true;

Notice Is Hereby Given, that a hearing in the above-entitled proceeding will be held on March 22, 1950, at 10:00 A.M., in Room 3237, New Post Office Department Building, 12th and Pennsylvania Avenue, Washington, D. C., before a Trial Examiner of the Post Office Department.

If you desire to file an answer to the complaint, the original and two copies thereof must be filed on or before March 17, 1950.

Notice Is Further Given, that you may appear at such hearing and may be represented by counsel; that you may cross-examine all witnesses produced by the complainant; and that you may produce such competent, material and relevant evidence as may have a bearing on the issues.

(Signed) Daniel J. Kelly
Daniel J. Kelly,
Chief Trial Examiner

SOL-40a
(9-8-49)

65

POST OFFICE DEPARTMENT
Office of the Solicitor
Washington 25, D. C.

March 6, 1950

Postmaster,
Chicago, Illinois

F. & L. No. 19/9

Dear Sir:

Please have delivered personally by an employee of your office the enclosed letter addressed to:

GLORY BEE PRODUCTS, and
GLORY BEE
Chicago, Illinois

The last known street address of the addressee is 4727 No. Damen Ave.

Kindly have the employee effecting delivery obtain from the person accepting service a receipt showing the exact time of delivery. Please forward the receipt to me within seven days after the receipt hereof.

In the event that no person can be found who will accept delivery of the letter and sign a receipt therefor, it may be delivered in the usual manner with other mail addressed to the respondent named above and a statement to the effect that such delivery has been made showing the time and place thereof, and signed by the postal employee who so delivered the enclosed letter, should be promptly forwarded to this office.

Please inform me also within the time above specified as to the average amount of mail that is arriving at your office daily addressed to each of the above names.

Very truly yours,
(Signed) Frank J. Delany
Frank J. Delany,
Solicitor.

Enc.
SOL-53
(2-24-49)

66

COPY

Office of the
General Superintendent of Mails

In your reply please refer to initials, date, and number
MH

UNITED STATES POST OFFICE
Chicago 7, Illinois

March 15, 1950

Solicitor,
Post Office Department,
Washington 25, D. C.

Dear Sir:

In accordance with your communication of March 6, 1950 (Sol-53 2-24-49—F. & L. No. 19/9), the letter submitted by you, addressed to Glory Bee Products, and Glory Bee, 4727 North Damen Avenue, this city, has been personally delivered to the addressees at 1:20 P.M., March 13, 1950, as evidenced by the enclosed receipt.

An average of forty-five (45) pieces of mail is being received daily at this office for Glory Bee Products. None has been received directed to Glory Bee.

Very truly yours,
(Signed) John Haderlein
John Haderlein,
Postmaster.
F

Encl.
ecb•

67

UNITED STATES POST OFFICE
Office of the General Superintendent of Mails
Chicago 7, Illinois

Received from Postmaster, Chicago, Illinois, one (1) Official Letter, bearing return card of Post Office Department, Office of the Solicitor, Washington 25, D. C., addressed Glory Bee Products, and Glory Bee, at Chicago, Illinois.

(Name) and Glory Bee
Glory Bee Products Co
per M. Koche
(Title) Manager

(Date) 3-13-50
(hour) 1-20 PM
McFuly 2551

68

POST OFFICE DEPARTMENT
Office of the Solicitor
Washington 25,
D. C.

* * (Caption—F. & L. Docket 19/9) * *

ANSWER

Now come the Respondents, Glory Bee Products and Glory Bee, by their attorneys, Frank E. and Arthur Gettleman, and for Answer unto the Complaint filed herein as follows:

1. Respondents deny that they are conducting a scheme for obtaining money through the mails by means of pretenses, representations and promises, which are knowingly false or fraudulent, in violation of Sections 259 and 732 of Title 39 U. S. Code, or in violation of any other existing law or laws.
2. Respondents admit that they have caused to be printed and disseminated circular matter sent through the mails to various addressees in order to sell their products, but deny that the printing and
69 disseminating of such circular matter is part of any scheme for obtaining money through the mails by

means of pretenses, representations and promises, which are knowingly false or fraudulent and in violation of the laws as set forth in the Complaint.

3. Respondents further answering, admit Paragraph (3) of said Complaint.
4. Respondents deny that it has been representing to the public in substance and effect, the allegations set forth in Paragraph (4) of the Complaint under subtitles a, b, c, d, e, f, g, h, and j.
5. Respondents deny that the statements used in the printed matter referred to in the Complaint are false and fraudulent and further deny that the said statements materially misrepresent the value of said products, their efficacy and the benefits to be obtained from the use thereof, as alleged in said Paragraph.

Respondents deny that they executed an Affidavit on June 16, 1949 with the Solicitor of the Post Office Department and further deny that the execution of an Affidavit filed previously with the Solicitor of the Post Office Department by one "Alice Perkins" of Chicago, Illinois, in any way binds or affects these Respondents in any respect whatsoever.

Wherefore, these Respondents respectfully pray that the Complaint herein be dismissed.

(Signed) Glory Bee Products & Glory Bee
Respondent
Their Attorneys
(Signed) Frank E. & Arthur Gettleman

Dated at Chicago,
Illinois this 16th day of
March, A. D. 1950.
Frank E. and Arthur Gettleman,
10 So. LaSalle St.,
Chicago 3, Illinois.

70

POST OFFICE DEPARTMENT
Washington

Order No. 43833 Aug 16 1950

It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that Glory Bee Products, Glory Bee, and their officers and agents as such,

at Chicago, Illinois, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of sections 259 and 732 of title 39, United States Code, said evidence being more fully described in the finding of fact of the Solicitor for the Post Office Department of the date of August 14, 1950, and said finding being hereby adopted as the finding of the Postmaster General, and by authority vested in the Postmaster General by said laws the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concerns & parties and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concerns & parties to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or printed upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the appropriate dead letter branch with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

(Signed) J. M. Donaldson
Postmaster General.

(Case No. 78350-F)
To the Postmaster.
Chicago, Illinois.

71

POST OFFICE DEPARTMENT
Office of the Solicitor
Washington 25, D. C.

August 14, 1950.

• • (Caption—F. & L. Docket 19/9) • •

FINDING OF FACT AND RECOMMENDATIONS TO POSTMASTER GENERAL FOR THE ISSUANCE OF A FRAUD ORDER.

There is set forth below the finding of fact and recommendation of the Trial Examiner in the above entitled case:

FINDING OF FACT AND RECOMMENDATION
OF
TRIAL EXAMINER

The complaint and notice of hearing were delivered to the respondent on March 13, 1950, in the manner provided by Rule 151.9. The hearing was conducted before me on March 22, 1950. The respondent was represented by counsel at that time who filed a written answer. Respondent was also permitted to file a brief which has been considered. The entire official record, including the transcript of proceedings, pleadings and exhibits, is made a part hereof by reference.

72 The enterprise alleged to be in violation of the above statutes is averred in the complaint to be in substance the advertisement and sale through the mails of products called "Glory Bee Fast Luck Brand Incense" and "Incense Numbers Tablets" under knowingly false and fraudulent representations to the effect:

a. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve the health of users;

b. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve the financial condition of users;

c. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve the social powers of users;

d. That the said "Glory Bee Fast Luck Brand In-

cense", when used as directed, will enable purchasers "to meet" their "obligations";

e. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will enable purchasers to obtain profitable employment;

f. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will "pep" up persons lacking in physical stamina;

g. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will accomplish "wonderful changes for the better" in the home of users;

h. That the said "Glory Bee Fast Luck Brand Incense", when used as directed, will improve "everything" in the lives of users, and

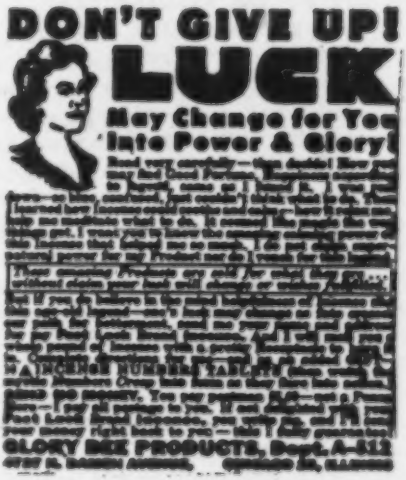
j. That the said "Incense Numbers Tablets", when used as directed, will produce numbers which will bring good "luck" to users.

The complaint further alleges that the operation of this enterprise is in violation of the terms of an affidavit executed on June 16, 1949, and filed with the Solicitor of the Post Office Department by Alice Perkins of Chicago, Illinois.

A file of newspaper and periodical advertisements and a file of printed circular matter used by respondent to
73 advertise its products were received in evidence (Gov. Exs. 1, 2). Photostatic reproductions of this material are attached hereto as pages 4, 5, 6, 7 and 8:

ER'S ALMANAC FOR THE STATES OF NORTH CAROLINA, SOUTH CAROLINA,
ORGIA, FLORIDA, ALABAMA, MISSISSIPPI, TENNESSEE, LOUISIANA,
XAS AND ARKANSAS - Atlanta, Georgia - Year 1950.

Govt. Exhibit 1-D



25

Govt. Exhibit 9-C-1

GLORY BEE PRODUCTS

4727 N. DAMEN AVE., CHICAGO 25, ILL.

These amazing PRODUCTS are sold to you for what they actually are — without claim your luck will change or wishes fulfilled.

Don't Give Up!
Your Luck May Change
Into Power and Glory!

Have Hope and Faith.

FILED MAR 21 1950

My Dear Friend:

This Message may be for you! Read very carefully. Get its full meaning and intent. Note, I don't claim any supernatural powers in luck. But, nevertheless,—here is My Story based solely on age-old legend—that one's luck may change as fate crosses our path for betterment. So, if you do believe in LUCK—read further--then decide what to do.

Therefore, I say to you. Don't give up! Your Luck may change. You may find good fortune and happiness yet. If you are discouraged and feel spiritually low at this time,—it behooves you to heed the words in this Message, because this bit of encouragement may help you immensely toward success and happiness.

I was so real down—so blue—so tense—so low, so terribly confused, that I just couldn't think what to do. I was all ready to give up and just let things go as they pleased,—and not make any effort at all to change these crossed conditions.

Then I learned from an old Book on FOLKLORE, the mystic meanings, fantasies and age-old beliefs on good and bad luck. And, how INCENSE could soothe and calm—how it could relax me and help me gather my thoughts together and meditate just what to do.

Well, it seemed just like magic the way things got. Maybe your luck can change too! Will you try it my way for just 7 days? Will you try to be imaginative with me, hopeful and exert your faith, your spirit for Good to come to you in happiness, Love, Romance, Social Success and a contented Home Life!

over—

Just return the Order Form with your name and address in my Personal Envelope. I will mail you a whole Pound of this FAST LUCK Brand INCENSE. With complete directions for use—

And more, much more,—as an Extra Gift, absolutely FREE of Extra cost—a very pretty Receptacle to burn the Incense in—

And as an added SPECIAL GIFT—I include in your package—16 △ INCENSE NUMBERS TABLETS—then watch those Mystic Numbers creep out into form as the Tablets flare into action. They may bring you LUCK! You will really be delighted with your FAST LUCK Brand INCENSE that I feel sure. You just write me right back. I want to be honest with you.

It is amazing how many of us continue to this day—our fantasy in the legend of age-old beliefs in good and bad luck. If you believe in LUCK, try it for a period of 7 days. Prove to yourself the Power and satisfaction of FAST LUCK Brand INCENSE.

Now here is my GUARANTEE!—If you cannot report to me complete satisfaction and delight in 7 days with my Fast Luck Brand Incense and Incense Number Tablets—you can have your purchase price back immediately! I don't want your money if you are not delighted and completely satisfied.

The Ancients used Incense for Power and Glory in calmness—clearer thinking—to achieve greater happiness in Love, Romance, Money and a Contented Home Life. We make no claims regarding the veracity of such legends. We sell our products only for what they actually are! Money Refunded if not delighted.

I send you good wishes—good luck—and urge you to return the ORDER FORM as fast as the mails can bring it to me—and I will start your FAST LUCK Brand INCENSE and INCENSE TABLET NUMBERS right back to you—quick!

Your friend in need,

Glory Bee

GLORY BEE PRODUCTS

GB/K

Govt Exhibit 2-C-2

GIVEN FOR PROMPTNESS **GIVEN**

This Smart BOOK

Magic Power of NUMBERS

"The tremendous interest of late in Names and Numbers. The study of Numerology opens a hidden world of self-analysis, often a reason for apparent success or failure. Here is a Booklet of vast interest for the Student, or it can well serve as a means of good Entertainment. It would be my hope and wish that you use these POWERS for your self-advancement in Money, Love and Happiness."

LEWIS deCLAREMONT, Author

Your Reward

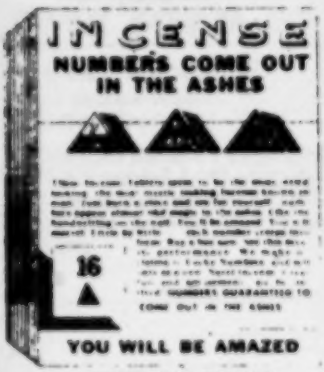
GLORY BEE PRODUCTS

CED MAR 21 1950

Govt. Exhibit 2

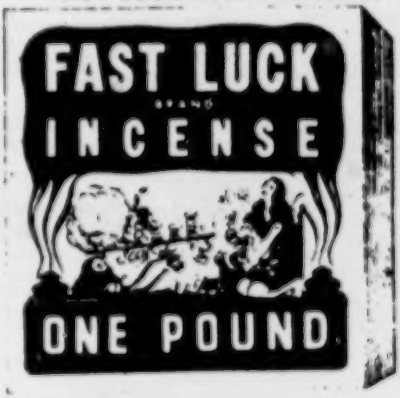
Govt. Exhibit 2-C-3

16 ▲ INCENSE LUCKY NUMBERS TABLETS



WATCH THE NUMBERS CREEP OUT—THEY MAY BRING LUCK

1 FULL POUND OF FAST LUCK Brand INCENSE



COMES WITH IT—EXTRA!

A VERY PRETTY RECEPTACLE TO BURN YOUR FAST LUCK BRAND INCENSE IN

All 3 Above Products – $5.00 – Don't Pay a Penny More!

CED DEC 21 1950

Govt. Exhibit

Govt. Exhibit 2-C-8

Mail This Back To Me—Today

ORDER FORM FOR

GLORY BEE PRODUCTS
4727 N. Ronson Ave.
Chicago 25, Illinois

I will give your Method 7 Days Trial.
If I am not delighted, I will return the product
and ask for my money back. I will pay only the
delivery. This includes everything. Not a penny
more to pay.

NAME _____

ADDRESS _____

CITY _____

P. S. REMEMBER—you pay Postman $4.00 plus C.O.D. postage charges. You may send
your $4.00 with your Order NOW. (Postal charges and higher dollar orders shipped C.O.D.)
me if you can NOW. Thanks very much from—GLORY BEE. Guaranteed by Good Housekeeping
we make no claims your luck will change or wishes fulfilled.

80 A written statement showing the composition of respondent's incense and "Lucky Numbers Tablets" was received in evidence as Government Exhibit 3, together with samples of these preparations and "directions" for use as parts of Government Exhibit 4.

The "Fast Luck Brand Incense" consists simply of aromatic oil and coloring in a sawdust base; the "Numbers Tablets" are composed of an aromatic oil in a charcoal base containing numbers made of ink saturated with copper sulphate, which appear when the tablets are lighted. Respondent charges $5 for these products.

It is shown in the record (R. 10, 16) that these products are the same as those sold in an earlier case (F. & L. Docket 18/5), which involved a "lucky incense" mail order enterprise operated in the name of Alice Perkins, who has been for some years an employee of the operator of the enterprise here under consideration, Samuel D. Cates. Under Rule 151.15(d) of the Rules of Practice I take official notice of the records in that case, including the transcript of proceedings.

The evidence in both the Perkins case and the present case shows that Cates has for some time operated a business under the name of Standard O & B Supply Company, selling by mail on a large scale a variety of incense, lucky talismans, lode stones, magic herbs and the like (see also Gov. Ex. 4-A-B). This business and the enterprise here under consideration are operated from the same address, which is likewise the address from which Alice Perkins operated her aforesaid enterprise. This evi-

81 dence further shows that Cates and Alice Perkins in January, 1949, joined to instigate as a branch or department of the Standard O & B Supply Company, the sale of the "Fast Luck Incense" and "Numbers Tablets," using the name of Alice Perkins for that purpose; that on June 16, 1949, following issuance of a fraud order complaint directed against Alice Perkins alleging the conduct of a scheme to defraud by Perkins in the operation of that business, the subsequent to hearing on the complaint, Perkins was permitted to execute and file with the Post Office Department an affidavit of discontinuance as a basis for disposing of the charges in that case in lieu of further proceedings; and that Cates was aware of the execution and filing by his employee of that affidavit. The evidence shows that Cates began the mail

order enterprise at issue here, involving the sale of the same products, on or about June 1, 1949 (R. 11), and that Alice Perkins was then, and at the time of this proceeding continued to be, in his employ (R. 12). It is further shown that the incense and numbers tablets sold in this case are ordinary commercial products manufactured by, and procured by respondent in bulk from, Chicago concerns, and that they possess no properties not possessed by any other ordinary incense generally (Perkins Tr. 15; Glory Bee Tr. 10).

Testimony in both the Perkins and present case shows that Perkins and Cates are well aware of the superstitious beliefs held by many people with respect to the mystical efficacy and good luck potentials of income and related curios, including the miscellany sold by Cates in the Standard O & B enterprise, and that the advertising literature in the Perkins case was designedly worded and composed so as to appeal to persons possessing such
82 beliefs (Perkins Tr. 15, 16, 17; also Glory Bee Tr. 13). Cates' employee freely disavowed her own personal belief in these superstitions (Perkins Tr. 15, 16).

Cates, when interviewed by the post office inspector who investigated this case, would not state definitely, one way or the other, whether he himself did or did not believe in such things (R. 13). However, considering the background against which Cates and Perkins joined up to launch the Perkins enterprise, and their commerciol motives in so doing, as well as other facts and circumstances of record, and inferences to be reasonably drawn therefrom, it would be foolish and unreliable to assume that, as a matter of fact, Cates does possess any such belief. In fact, in the case before me, respondent was willing to concede at the hearing that the incense would not cure any diseases, chronic or otherwise, or improve the health of users thereof, leaving out the mental aspect (R. 21, 22).

The respondent contends in his brief that he is doing no more than selling his incense for what it is, without misrepresenting it in any way, and calls attention to the various disclaimers of any supernatural power for his incense, which appear here and there in the periodical and newspaper advertisements and printed circulars. The respondent relies heavily upon Dolan *v.* Hurley, 283 F. 695 (affirmed 297 F. 825), which held that so-called "lucky stones" could lawfully be sold through the mails if sold

"for what they are, without lying about them." Respondent contends that he is doing no more than selling his incense for exactly what it is.

Upon the basis of a careful examination of the contents of respondent's advertisements and printed circulars,
83 and considering the class of persons to whom they will and obviously are designed to appeal, and the effects which advertisements of this kind will most probably produce on their minds, I am unable to agree with this and other contentions raised in respondent's brief.

Respondent Cates, whose lack of belief in the mystical luck bearing properties of his incense may be fairly and reasonably deduced as a fact not only from the circumstances previously alluded to, but from the wording of the disclaimers themselves, goes much further in his representations and advertising statements than simply to offer his products for what they actually are, namely, and as he well knows, ordinary, non-supernatural, commercial brand incense. The periodical advertisements are headlined in eye-catching black type, much larger than that which follows, with the admonition, "Don't Give up! Luck May Change For You Into Power and Glory!" This reassurance is immediately fortified by use of language purporting to be the narrative in the first person of a user of respondent's incense. With this incense, so the narrative goes, "You may find Good Fortune, Happiness according to legend, the same as I found it." "It seemed like magic the way things got." By these and other adroitly turned phrases, the accuracy of the "legend" is thus vouched for; and it is reasonable to assume that the "power—" and luck-hungry readers of these advertisements will pay little or no attention to the disclaimers, one of which, even while attempting to disclaim, nevertheless, and in tenor with the lead-off promises, describes respondent's products as being "amazing."

84 The same heart-warming assurances of good fortune and change of luck for the better are repeated in respondent's printed circulars, as examination of their photostatic reproductions attached hereto, will show. Again what undoubtedly will impress and what is intended to impress the mind of the superstitious reader of these circulars, to a degree far beyond the power of the interspersed disclaimers to minimize or erase, are the numerous testimonials printed in one of these circulars which

respondent refers to as "personal excerpts from users of Glory Bee Fast Luck Brand Incense," containing "their sincere, heartfelt emotions of thankfulness."

These testimonials in purport and effect attribute to use of respondent's incense such results as better health (F495, 476, 450), improved financial conditions (F476, 479), "power" to meet family obligations (F473), "wonderful changes for the better" in the family home (F474), the obtaining of profitable employment (F479), improved social power (F468), peace in the home (F473), and the acquisition of new "Pep" (F490). The lucky number incense is also accredited with doing its own part in bringing luck, cheer and good fortune to the users (F451, 452). At other places in the advertising readers are told that with respect to the numbers Incense, "you will be amazed," and "watch the numbers creep out—they may bring you luck."

Thus, this respondent by these advertising devices vouches throughout his advertising literature for the validity of the "legend" and endorses it as worthy of belief. He misleads his superstitious readers to believe that the "legend" is reality, and offers for sale the instrumentalities by means of which he shows this has been and can be accomplished. He invites the readers of the testimonial advertising sheet to "BE THE JUDGE" of what they read and "Maybe You'll Be Convinced!" He actively seeks to convince them. In the midst of making "no claims that your luck will change or wishes will be fulfilled" (reverse side of testimonial sheet) he nevertheless guarantees "the Full Value of our products or refund your money if you are not delighted." The testimonials and other advertising assurances serve the purpose of demonstrating to the reader what respondent means by "Full Value" of his products, and what the purchaser may expect to experience in the way of "delight" from them.

In contriving these advertisements and printed circulars, respondent has taken great pains to insure that his disclaimers will exert only negligible effects, if any at all, upon the minds of his credulous readers. He has gone to great lengths not to permit his patrons to believe that he is selling his incense simply for what it actually is. He has composed advertisements well calculated to de-

ceive and defraud the ignorant, the credulous and the superstitious.

Respondent's advertising claims for his incense are completely opposed to common knowledge and experience. Respondent having designedly prepared his advertising literature so as to prey upon the superstitious beliefs of ignorant people, his fraudulent purpose to deceive them is self-evident.

86 I find from the evidence before me that respondent in the operation of this scheme, is making in substance and effect the representations complained of, with knowledge of their falsity and of their capacity to deceive and mislead that class of persons to whom they are primarily directed; and that such statements materially misrepresent the value of respondent's incense, its efficacy and the benefits to be derived from use thereof. I, therfore, recommend that a fraud order issue against Glory Bee Products, Glory Bee, and their officers and agents as such, at Chicago, Illinois.

(Signed) James C. Haynes, Jr.
Senior Trial Examiner.

After a review of this case, I approve and adopt the foregoing finding of fact and recommendation of the Senior Trial Examiner.

(Signed) Frank J. Delany
Solicitor.

87

BEFORE THE SOLICITOR FOR THE POST OFFICE DEPARTMENT

Holding a Fraud Order Hearing

• • (Caption—F. & L. Docket 19/9) • •

TRANSCRIPT OF PROCEEDINGS
Wednesday, March 22, 1950,
Washington, D. C.

VOLUME I
Pages 1 to 51, inclusive.

Recorded by:
B. D. Huggins.
Transcribed by:
Teresa M. Quinn,
Solicitor's Office,
Post Office Department,
Washington, D. C.

88

POST OFFICE DEPARTMENT
Office of the Solicitor
Washington 25, D. C.

CERTIFICATE

I, James C. Haynes, Jr., Senior Trial Examiner, hereby certify that the attached document, consisting of 51 pages, is a true and correct transcript of the proceedings of a hearing conducted by me on March 22, 1950, in the case involving alleged violation of Sections 259 and 732 of Title 39 U. S. Code, by Glory Bee Products and Glory Bee, at Chicago, Illinois, F. & L. Docket 19/9.

Witness my hand this 18th day of August, 1950.

James C. Haynes, Jr.
Senior Trial Examiner.

90

BEFORE THE SOLICITOR FOR THE POST OFFICE DEPARTMENT

Holding a Fraud Order Hearing

* * (Caption—F. & L. Docket 19/9) * *

Washington, D. C.
Wednesday, March 22, 1950.

Hearing of the above-entitled matter came on before Honorable James C. Haynes, Jr., Senior Trial Examiner of the Post Office Department, Office of the Solicitor, in the hearing room of the Post Office Department, on Wednesday, March 22, 1950, at 10:20 o'clock a.m.

91 Appearances:

On behalf of the Post Office Department:
Ralph B. Manherz, Esq.
On behalf of the respondent:
Frank E. Gettleman, Esq.

PROCEEDINGS

(Inspector W. J. Means was sworn as a witness for the Post Office Department by a Notary Public of the District of Columbia.)

Trial Examiner: Both parties have announced ready to proceed in the matter before me today, in F. & L.

Docket 19/9. You may proceed, Mr. Manherz. May I state here that I have examined the complaint and the respondent's answer thereto and I understand there's no question of the service of the notice of hearing and the complaint upon the respondent in this case.

Mr. Gettleman: That's right.

Trial Examiner: All right, Mr. Manherz, you may proceed.

Mr. Manherz: Mr. Examiner, in view of the—excuse me just a minute.

(Off record)

Mr. Manherz: Prior to the opening of this record, Mr. Examiner, the exhibits desired to be offered in evi-
92 dence in this case by the government were shown to counsel for the respondent and he examined each one of them. They have ben marked Government Exhibits 1 through 4, respectively, and counsel for the respondent has indicated that he is willing to stipulate into evidence without introduction—without identification these various exhibits, is that true—

Mr. Gettleman: (Interposing) That's right.

Mr. Manherz: —Mr. Gettleman?

Mr. Gettleman: That's right, Mr. Manherz.

Mr. Manherz: And so with a brief description of each of the exhibits, I'd like to offer, Mr. Examiner, without putting on the witness to identify them.

Trial Examiner: Very well.

Mr. Manherz: The Government Exhibit 1, Mr. Examiner, is a file from newspapers and periodicals and consists of ten separate advertisements taken from various sources indicated on each particular exhibit. 1-A, for instance, is taken from the March 4 issue of the Chicago Defender, published at Chicago, Illinois and they go through to an advertisement taken from the Southern Farmer, issue of November, 1949, which is Government Exhibit 1-F. As I stated before, there are ten separate advertisements in this Government Exhibit 1.

Trial Examiner: They will be received in accordance with the agreement between you gentlemen, as exhibit 1 and sub exhibits.

93 (Newspaper and periodical advertisements marked for identification as Government Exhibit 1 and sub exhibits were offered and received in evidence.)

Mr. Manherz: Mr. Examiner, Government Exhibit 2, to be stipulated in evidence, consists of a file of circular matter sent through the mails by the respondent and consists of three separate files; three separate mailings. Government Exhibit 2-A contains seven separate pieces and consists of a printed letter—circular rather, headed "You Read—Be The Judge". Another printed in purple ink and headed "Glory Bee Products"—that's Government Exhibit 2-A and 2-A-1. Government Exhibit 2-A-2 is a little slip headed "Given For Promptness Given—This Smart Book—Magic Power of Numbers". 2-A-3 is another printed circular printed on both sides and headed "Incense—Lucky Numbers Tablets". Government Exhibit 2-A-4 is the return reply envelope addressed to Glory Bee Products and 2-A-5 is the envelope in which this matter was sent through the mails. Government Exhibit 2-B is practically a duplication of Government Exhibit 2-A except that it was mailed at a later date than 2-A. 2-C is a further duplication of Government Exhibit 2-A except, Mr. Examiner, that it was received by Inspector Dunbar, according to his date stamp, on March 21, 1950. These three mailings have been shown to Mr. Gettleman and he indicated his willingness to stipulate them without identification.

Mr. Gettleman: That's right.

94 Trial Examiner: They will be received in evidence.

Mr. Manherz: And so I offer, Mr. Examiner, Government Exhibit 2 and sub exhibits.

(Circular advertisements marked for identification as Government Exhibit 2 and sub exhibits were offered and received in evidence.)

Mr. Manherz: Mr. Examiner, I now offer as Government Exhibit 3, the formula for the two products which Mr. Gettleman has examined and indicated he is willing to stipulate.

Mr. Gettleman: That is correct.

Trial Examiner: For the identification of the formula, Government Exhibit 3, it will be received.

(Formulas marked for identification as Government Exhibit 3 and sub exhibit numbers were offered and received in evidence.)

Mr. Manherz: And Government Exhibit 4, Mr. Examiner, comprises a carton which was given to a post office inspector—it was given to Post Office Inspector Means on

November 29, 1949, at an interview had by him with Mr. Cates, the respondent, the promoter of this enterprise and his attorney, Mr. Frank Gettleman who is here today. This exhibit contains Government Exhibit 4-A being, as I understand it, a one pound package of Fast Luck Brand Incense, and Government Exhibit 4-A-1 which is a printed letter in purple ink headed "Fast Luck Incense—Di-
95 rections" and that accompanied the incense. Then there is Government Exhibit 4-A-2 which is a package of the incense numbers—lucky numbers, marked 4-A-2 which was given the Inspector on that date. 4-A-3 is a catalog of the Standard O & B Supply Company which was given to Inspector Means on November 29, and as I understand it was contained in the same package?

Mr. Gettleman: That's right.

Mr. Manherz: Government Exhibit 4-A-4 is a little receptacle, I believe, for the purpose of burning the incense, is that correct, Mr. Gettleman?

Mr. Gettleman: That's right.

Mr. Manherz: These were all given to the Inspector on the date of his interview and I offer them as Govern-- ment Exhibit 4. I understand Mr. Gettleman waives identification.

Mr. Gettleman: That's right.

Trial Examiner: With that understanding they will be

Mr. Manherz: Government Exhibit 4-A-4 is a little

(Samples of material furnished Inspector Means by Mr. Cates marked for identification as Government Exhibit 4 and sub exhibit numbers were offered and received in evidence.)

Mr. Manherz: Mr. Means, will you please take the stand.

96 Whereupon,

WILLIAM J. MEANS, called as a witness for and in behalf of the Post Office Department and having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Manherz.

Q. Please state your name and occupation?
A. William J. Means, Post Office Inspector.
Q. Mr. Means, where are you located?
A. Chicago, Illinois.

Q. In the course of your duties as a Post Office Inspector, Mr. Means, did you—were you assigned to make an—have an interview with one Mr. Samuel D. Cates, of Chicago?

A. Yes, sir.

Q. Did you have such an interview?

A. He was interviewed at my office at Chicago, on November 29, 1949.

Q. And was there anybody else present with him at that time?

A. His attorney, Frank E. Gettleman, was present.

Q. That's Mr. Frank E. Gettleman, who sits here in front of you today?

A. That's right.

Q. Mr. Means, at that time Mr. Cates gave you the carton containing the exhibits marked Government Exhibit 4?

97 Q. Now would you please tell the Examiner what information was furnished you at the time of this interview? First, Mr. Means, they were aware of the fact that you were a Post Office Inspector, were they not?

A. Yes, sir.

Q. Would you please tell the Examiner, Mr. Means, what information was furnished to you by the respondent and his attorney at the time of this interview on November 29, 1949?

Mr. Gettleman: Just one moment, if the Examiner please, I object to the Inspector reading from a typewritten statement that he has in his hands.

Trial Examiner: Inspector, are you able to narrate the substance of the conversation with Mr. Cates and his attorney without the use of notes to refresh your recollection at this point?

The Witness: I think so.

Trial Examiner: Well, will you proceed in that manner.

The Witness: Well, Mr. Cates told me that he operated about three or four businesses at 4727 North Damen Avenue. I think one was a jewel company and the other was the O & B Supply Company and the Glory Bee Products Company and—I forget what the fourth one was but I believe there were four there.

Mr. Manherz: The S. D. Cates Company?

The Witness: I believe that's right, yes. Then I asked
—there was considerable conversation there but when
98 I asked him about Alice Perkins, I believe it was, one
of his employees who formerly ran an incense company there.

Mr. Gettleman: If your Honor pleases, I object to his conclusions as to what she was and his conversation should be tied down to conversation, what he said and what Mr. Cates said.

Trial Examiner: That is correct. You can confine yourself to statements of fact, Inspector. If you know what she was, an employee, so state.

The Witness: Mr. Cates said that she was the same employee who operated the incense company against which a fraud order had been issued in June of that year.

Mr. Manherz: Fraud order—complaint—

The Witness: For a complaint of some kind.

Mr. Gettleman: Now, I'll have to object to that if the Examiner please. It's manifestly unfair to change the testimony while the witness is testifying. He said that a fraud order—period.

Mr. Manherz: Mr. Examiner, of course, this Inspector was not the Inspector who investigated the Alice Perkins case in that year and it's apparent that that was merely a slip of the tongue.

Trial Examiner: Slip of the memory perhaps.

The Witness: Well, it was some proceeding that issued against her and stipulations. I recall now that he recalled that she signed a stipulation and that he was aware that she signed it. This same woman was in his employee in about the same capacity but that she had nothing to do
with the incense deal. I asked him if he believed in
99 whether these incense tablets had any—would bring
people luck and one thing or another. We talked about that for some time but he wouldn't make any definite statement as to whether they did or did not. Then I asked him if that was the same product that this Alice Perkins used and he said it was; that he was selling the same products and he said that he had taken it up with his attorney, and it was not against the law to sell incense; and that he prepared this literature which he was sending out. Then I asked him where he got this incense and he told me that he got the powdered incense from the Ray

Wheeler Laboratories. I think they're also located at 4724 North Damen Avenue and he got the numbered incense from the Lava Incense, which is operated by a Mr. Fritz and he gave me the address of where that was. I went down there and saw this Mr. Fritz, and he told me that he had sold that to Mr. Cates at $7.20 a gross, I believe, about five cents a package.

Mr. Gettleman: If the Examiner please, I ask that that be stricken, that's not part of any conversation with Mr. Cates and what he talked to somebody else is strictly elementary hearsay.

Trial Examiner: That is correct. However, part of his words are corroboratory of statements I think that Mr. Cates made to him. I'll allow that part to stay in the record. Other such statements not related to any statement made by Mr. Cates previous to that with which Mr. Means' statements might tend to corroborate, may go
100 out.

The Witness: That's about the gist of the conversation, I think, I had with Mr. Cates and Mr. Gettleman.

By Mr. Manherz:

Q. Did Mr. Cates tell you whether or not he owned the Glory Bee Products—

Mr. Gettleman: (Interposing) I'll object to that question if the Examiner please. He said that was the gist of the conversation. I think he repeated the entire conversation. The question of Mr. Manherz's is leading, very leading. I think it should be stricken. I object to it.

Trial Examiner: It may be leading, that's correct, but the Inspector, after all, does have a human recollection with all its faults. I'll allow Mr. Manherz to pursue the—any further details of the conversation by means of allowing these questions if he may desire.

Mr. Gettleman: That's correct, if he asks him if anything further was said.

Q. Did you learn from Mr. Cates who owned the Glory Bee Products?

A. He said that he owned and operated it and that he had registered this name on or about June 1, 1949 and he went further and called up his office and gave me the registration number which I afterwards checked with the County Clerk at Chicago and found it to be correct.

101 Q. Did Mr. Cates tell you whether or not Alice Perkins was still in his employ?

A. He said that she was still in his employ but in about the same capacity that she was except that she wasn't in the employ in connection with the incense deal—was not employed in connection with the incense deal.

Mr. Manherz: You may examine, Mr. Gettleman.

Cross Examination by Mr. Gettleman.

Q. Mr. Means, that was a pleasant conversation, was it not?

A. It was.

Q. And if I remember correctly, that was in the afternoon of November 29, 1949?

A. That's right.

Q. Do you remember at the time, Mr. Means, your asking Mr. Cates if he believed in luck?

A. I asked him—there was quite a bit of conversation about luck and whether he believed in these lucky numbers and one thing or another.

Q. And did he not tell you about his background concerning the burning of incense at that time?

A. There was some conversation but I don't recall
102 exactly what it was. I may bring it out a little more but at the present time I don't just recall what that conversation was.

Q. But you do remember that there was considerable talk about the burning of incense and luck, do you not?

A. I was trying to establish whether he believed or didn't believe in these things himself and he never made any definite statement.

Q. But you did talk about it for quite a while?

A. That's right.

Q. In my presence, at the table?

A. That's right.

Q. Don't you remember now, at this present time, what he said in reference to the question of your asking him whether or not he believed in the burning of incense and luck?

A. Well, I think that he said that a lot of people did believe in it.

Q. But you don't remember what he said.

A. Well, he wouldn't definitely say that he did or did not believe in it himself. That's the way I took what he said.

Q. Now, when you disregard, if you can, what you took it to be, and tell us if you remember exactly as you possibly can in what words he answered that question to you? If you can remember.

A. I can't remember the exact words that he used but from what he said I took it that he wasn't saying whether he did or did not believe in them, one way or the other.

103 Q. But you do remember your asking him about it, do you not, Mr. Means?

A. I asked him—we had considerable conversation on that.

Q. Will you tell us, Mr. Means, if you remember him telling you that Miss Perkins had nothing whatsoever to do with Glory Bee Products, at that time?

A. He did. He said that she wasn't connected with the incense deal.

Q. That's right. Will you try to refresh your memory and tell us whether or not he told you that she was employed by the O & B Company, do you remember that?

A. Well, his employee, in about the same capacity, is what he said.

Q. Did he not tell you that she was employed by the O & B Company?

A. Well, I wrote down on a piece of paper what he said at that time and in that why, he said that she was employed, in his employ, in about the same capacity except that she had nothing to do with the incense deal.

Q. Then you don't remember for a certainty whether or not he told you that she was employed by O & B Company, is that right?

A. I don't remember that he designated any particular company, at all. He may have been thinking about the

104 O & B when he was talking.

Q. Do you remember him telling you that O and B was a corporation? If you remember.

A. I don't remember if he said anything, he may have.

Q. Mr. Means, will you tell us whether or not you have the original notes with you?

A. I do.

Q. Could you look at them and refresh your memory as to what he told you about the O and B Company?

A. Well, I didn't write down everything that was said there. I only made notations of—

Mr. Gettleman: (Interposing) No further examination.

Trial Examiner: Any redirect, Mr. Manherz? I assume you withdrew your last question concerning the notes, did you Mr.—

Mr. Gettleman: (Interposing) He had already answered it. He said he didn't write everything down.

Trial Examiner: He was still looking at his notes there. I—all right.

Mr. Gettleman: You didn't write everything—

The Witness: (Interposing) No, I didn't write everything down.

Mr. Gettleman: That was my question and that's the answer.

105 *Redirect Examination by Mr. Manherz.*

Q. Mr. Means, did Mr. Cates at the time of this interview, last November, tell you whether or not he owned and operated the Standard O and B Supply Company?

A. He told me that he operated the Standard O and B Supply Company and about three others as I recall.

Q. That O and B Supply Company was one of the three that he owned and operated?

A. That's right.

Mr. Manherz: I think that's all.

Trial Examiner: That's all. You may step down, Mr. Means.

(Short recess taken)

Mr. Manherz: Mr. Examiner, counsel for the respondent and counsel for the Government decided to stipulate that the products sold under the name of Alice Perkins and that sold under the name of Glory Bee Products are substantially the same, is that correct?

Mr. Gettleman: Yes, that's the physical product, the incense—

Mr. Manherz: (Interposing)—and the numbered tablets?

Mr. Gettleman: Yes. In other words, the composition, the qualitative and quantitative formulae is at work—are, the same of the product. That's right.

Trial Examiner: Let the record show that the stipulation has been reached.

(Off record)

106 (Dr. Norris sworn at this point)
Whereupon,

DR. FRED W. NORRIS, called as a witness for and in behalf of the Post Office Department and having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Manherz.

Q. Doctor, will you please state your name?
A. Dr. Fred W. Norris.
A. And what is your occupation?
A. A medical officer of the Federal Food and Drug Administration.
Q. Where did you obtain your medical education, Doctor?
A. I have an A. B. degree followed by a degree of M. D. from the University Medical School in Galveston, Texas. I had practically two years experience there in clinics and in the hospital, Teaching Hospital and following this I was with the mine hospital, Mexico and moved over to Santa Domingo where I was in charge of the hospital there, a Mission hospital, for a couple of years, nearly two years. Then I was in practice almost two years in West Texas, in general practice in San Angelo, Texas, following which I came to the Government and have been for twenty years with the Government as Medical Officer, Food and Drug Administration.
Q. Dr. Norris, are you familiar with the—generally speaking—with the physical makeup of the human body?
107 A. That's part of my training as a medical doctor to know the workings of the physical and mental aspects of the human body.
Q. Are you also familiar with the abnormalities and diseases of the human body?
Mr. Gettleman: Mr. Examiner, please. I don't think that's proper examination. We have a very simple situation here that I don't believe requires the study of anatomy or physiology or bacteriology or microbiology. It's a very simple situation. I don't know what the pertinence of that line of questioning is to the issue.
Mr. Manherz: Mr. Examiner, the pertinence is I'm laying the foundation for future questions of this expert

witness as to whether or not the particular products here involved will do the things claimed for them as charged in the complaint.

Mr. Gettleman: Well, I think that's quite simple. Why don't you just ask him that? I mean, I'll agree that Dr. Norris is a medical man and has had considerable experience before this Department and the Food and Drug and has practiced medicine, is a general practitioner. I agree as to those qualifications.

Trial Examiner: You concede his qualifications—

Mr. Gettleman: (Interposing) Yes.

Trial Examiner: —as an expert medical witness, do you, Mr. Gettleman?

108 Mr. Gettleman: Yes, as a general practitioner, not of psychiatry or psychology but—I agree.

Trial Examiner: There are charges in the complaint which do involve, ah questions concerning the health of the users of these products and similar subjects and I assume that's the purpose of Government counsel's questions, that is for the purpose of laying a foundation for questions based on those particular charges and I will allow him to proceed on that basis.

Q. Dr. Norris, can you make a general statement concerning the causes of the ill health of persons generally? Or is that too broad a question?

Mr. Gettleman: I'll object to that, I mean, we'll be here for a year.

Mr. Manherz: If you went into detail, I agree, Mr. Examiner, but since Charge a, of paragraph four of the complaint specifically alleges that the product is sold for the purpose and upon the representations of improving health, in order to determine whether or not it will, wouldn't you first find out the causes of ill health and then see whether or not this preparation will accomplish that?

Mr. Gettleman: I'll object to that question, if the Examiner please. It's highly conjectural, it's vague, it's indefinite, it calls for a discourse on the entire field of medicine. I don't think it's germane to the issue, regardless of the charge, of course.

Trial Examiner: I think the question will neces-
109 sarily have to be fairly as broad as the charge. I do agree that we could go on here interminably but let's let the Doctor proceed and we'll see if he can curtail it

in his own way or summarize in his own way those causes. Go ahead, you may answer Doctor.

A. Ill health or lack of health can be generally classed as being due to two types of diseases, the acute and the chronic. Of course, generally the chronic follow the acute but they come on gradually and slowly, in some cases. The acute cases occupy or cause about forty per cent of the sickness, generally. Of course the chronic diseases occupy the rest. There are some acute conditions which either change to acute or chronic, sooner or later.

Trial Examiner: Did you have something in there—

Mr. Gettleman: Yes, I wanted to object to that and ask that it be stricken without any—I think the Doctor should testify to something specific here. We're roaming all over the field of medicine talking about acute and chronic diseases. It's too broad, entirely too broad.

Mr. Manherz: Well, Mr. Examiner, may I answer that? In connection with the representations in this case, the representations themselves, are very broad. In other words, this product is sold as a health improver and so if that charge is founded on representations appearing in the respondent's literature, thus it becomes necessary that the Government is permitted to establish that that representation is untrue. It becomes necessary first, to find
110 out what causes ill health and generally, because it's not limited in the literature, the representation as to the improvement of health is not limited to any particular or specific disease or condition and so that the field covered by the representation in the literature may be fully covered, it's necessary that we lay the foundation so that the doctor may cover that in answering specific questions, relating to the value of this product for that field.

Mr. Gettleman: Well, of course, you know that what you stated, Mr. Manherz, is purely conclusion. We state that there's nothing in this literature that mentions ill health and we'll stipulate if it will help that we don't sell, and we know that this will not cure any diseases. We don't say it. We'll gladly stipulate, if that's what you're trying to prove.

Mr. Manherz: If you'll stipulate that it will not improve health, we'll withdraw the Doctor.

Mr. Gettleman: We'll stipulate that it will not cure any diseases, either chronic or otherwise as the Doctor has testified.

Trial Examiner: Or in the language of the charges, would your stipulation go so far as to concede, Mr. Gettleman, that the use of the Glory Bee Fast Luck Brand incense will not improve the health of users, that is to say if they are in ill health due to anyone of the numerous diseases I assume the Doctor will testify—

Mr. Gettleman: Well, then you're going to reach the field of psychiatry where—

111 Trial Examiner: (Interposing) Leaving out the mental—leaving out the mental aberrations for the most part?

Mr. Gettleman: Yes, yes, we'll agree to that.

Trial Examiner: Now, is that stipulation agreeable to the Government as a basis for—

Mr. Manherz: (Interposing) The respondent agrees as I understand it, that this product mentioned in Charge a, will, when used as directed—will not improve the health of users, that is the physical health.

Trial Examiner: When that ill health may be due to organic or pathological causes.

Mr. Gettleman: Exactly.

Mr. Manherz: Mr. Examiner, I don't think we can—

Mr. Gettleman: (Interposing) Just a moment, if the Examiner please. I don't want to make a speech. But this goes on interminably for years. I'll object to the witness shaking his head. I don't understand any of that. He's a witness, he's a trial lawyer, he's a lawyer, he's everything. I suggest that the witness just take the stand as a witness, Dr. Norris.

(Discussion off record)

Mr. Manherz: Dr. Norris, you were testifying, I believe, when we were interrupted as to the causes of ill health. You were making a general statement for the relevance, the information of the Trial Examiner as to the causes of ill health, generally.

112 Trial Examiner: And may I add that if by classifying these diseases in accordance with the regular medical form of specification, the Doctor can abbreviate his testimony, I think that would be highly desirable on the record. Go ahead, Doctor.

The Witness: I merely classified in the acute and organic diseases or chronic diseases of organic nature in which there are changes in tissues which have developed,

which are irreparable and it is to these diseases—fully 70 to 80% of the deaths each year are caused by these chronic diseases.

Mr. Gettleman: (Interposing) If the Examiner please, I'll object to this whole line of questioning. I believe we're getting nowhere fast. I don't think that the answer that the Doctor should give in response to the question propounded by Mr. Manherz should be composed of a dissertation on diseases. I think your Honor should take judicial notice that no doctor can take the stand and tell about all diseases and I think if the Doctor does talk about diseases I'd like to have them named, so I can properly cross-examine him on those things. I cannot cross-examine the Doctor on a general, ethereal theory of his own as to general classification of all diseases in the world.

Mr. Manherz: Mr. Examiner, now, that objection puts the Government in a position of saying that the respondent's representation to improve health applies only to certain diseases and the Government refuses to be 113 put in that position.

(Argument off record)

Mr. Manherz: Dr. Norris, you were speaking of the—you had given us some statistics as to the health of individuals and those conditions of ill health which produced the greater number of deaths as I understand it. Was that your last testimony?

The Witness: Yes.

By Mr. Manherz:

Q. Would you proceed from there, Doctor?

A. Well, I could classify disease in various other ways but if you want me to name some diseases, I could.

Q. Well, Doctor, are diseases ever caused by germs?

A. Yes, I included those in acute disease. Germs and parasites are practically always acute. They can become chronic, but they're generally classed as acute infections and contagious diseases are due to viruses and germs and organisms of various sorts as the proven factual causes of disease.

Q. Doctor Norris, are you familiar with the composition of a product called Fast Luck Brand Incense?

A. Yes, I saw that record as to the composition—

(Off record)

Q. Dr. Norris, are you familiar with the directions for

use of the particular product, O and B Fast Brand Incense—Fast Luck Brand Incense? Did you examine the directions for use?

114 A. I examined it, I'd like to check again as to how much of the powder is to be used.

Q. I show you Government Exhibit 4-A-1. It's entitled "Fast Luck Incense—Directions".

Trial Examiner: Off the record while he examines it.

(Off record)

Q. Doctor, in connection with the formula for the incense is there anything in that formula that's unknown or strange or unusual insofar as the medical knowledge is—

A. (Interposing) You mean the use of aromatic oils as incense—

Q. Yes, sir; yes, sir.

A. —for the fumes or aroma or the burning of sawdust, I would say that the results would be within the realm of the knowledge of a physician as to what those things would do.

Mr. Gettleman: If your Honor please, I ask that that answer be stricken. It's not responsive to the question propounded by counsel. I think we ought to have something definite here—a specific question and a specific answer.

The Witness: Well, I know then what the fumes of sawdust would do and also the aroma of aromatic oils.

Trial Examiner: Except that they—

The Witness: (Interposing) There's nothing specific here at all, your Honor, as to how much, what size a room the thing is to be burned in, or how many people in

115 the room, or how far they are to be from the incense or anything of the kind.

Mr. Gettleman: If the Examiner please, I'll again voice my objection. I think the question that Mr. Manherz asked was a simple one calling for a direct answer and I think that's the way the examination should be conducted. We don't want dissertations on medicine. It's not necessary. We're not medicine men; we don't claim to be.

Trial Examiner: Will you rephrase your question, Mr. Manherz, I've forgotten it myself.

Q. Doctor, are you familiar, from a medical standpoint, with the various ingredients composing a product, Glory Bee, Fast Luck Brand Incense, as shown on the top portion of Government Exhibit 3?

A. Yes.

Q. Are you familiar, as a physician, with the effects of the use of a product containing those ingredients?

A. Yes.

Q. And Doctor, have you familiarized yourself with the directions for use of this product as shown in Government Exhibit 4-A-1 which is the printed circular of directions?

A. I have.

Q. Doctor, are the—I don't know whether you've answered this question, if you did don't answer it again. Are the constituents of this product well known?

116 A. The use of aromatic oils in the—and the effects on the human system, that is well known.

Q. No, Doctor, is there anything in this product that is not well known; that is unknown to you or to the medical profession, therein, if you know?

A. Well, the effects of burning sawdust—those are well known, too. I said that, or did I say that two products, aromatic oils and sawdust—

Q. Well, Doctor, you understand that they're composed into one particular product, that is the incense—

A. (Interposing) Yes.

Mr. Gettleman: (Interposing) Those are the ingredients.

Q. It's all one product when you get it.

The Witness: The aromatic oils are soaked into the sawdust, yes.

Q. Do you understand that it's all one product when—

A. (Interposing) That's right, when you burn the two together, yes.

Q. —as one product?

A. That's right.

Q. And, Doctor, what would be the physical reaction of igniting this incense? What would result from its burning?

A. Well, if a person is on the other side of the room, it makes considerable interchange of air as there ordinarily is in most rooms it probably has no effect at

117 all, outside of giving an aroma.

Q. Would there be the physical aspect of smoke arising from the urn in which the incense is burned?

A. Well, they could see the smoke and they could smell the aroma from the aromatic oils, a pleasant aroma. Most of the aromatics do give a pleasant aroma. If they

were right close, it could produce an irritant effect upon the eyes and nose and mucous membranes due to inhalation of the fumes. There is a tendency to irritation from smoke, from sawdust, from aromatic oils.

Q. Doctor, having in mind the constituents of this product, having in mind the directions for its use as stated on this circular, what, Doctor, would be your opinion respecting its value for improving the health of users?

A. I don't believe it will improve the health of the users.

Q. Now, Doctor, what would be the value of this product in your opinion when used as directed for pepping up persons lacking in physical stamina?

Mr. Gettleman: If the Examiner please, I'll object to this line of questioning. They're calling for ultimate conclusions of this witness, that your Honor is to decide ultimately. I think that the law is very simple and clear and elementary upon this subject and I'll object to a specific question which resolves ultimately in what your Honor has to decide in this case.

Trial Examiner: Well, of course, that's quite true. 118 The questions being asked by Government counsel, or the last one at least, does call for testimony which is in the nature of an ultimate conclusion which I'm supposed to decide or find. I believe there are two schools of thought in the law upon that question, Mr. Gettleman. Some courts do hold that, depending upon the nature of the case, that kind of testimony is allowed; others hold no. I would prefer in this particular proceeding though to have questions revolving around that particular charge based upon conditions, first of all, which may detract, or lower the pep—or rather lower the pep of the purchaser of this incense here, as evidential points rather than a broad conclusion.

Mr. Manherz: Mr. Examiner, I'll proceed in that way. By Mr. Manherz:

Q. Doctor Norris, what causes, if you know, a diminution or lack of physical stamina or pep, as is commonly understood, in persons?

Mr. Gettleman: If your Honor please, I'll object to that question. It's one that was similarly propounded. It's too vague—it's too definite, it takes in the entire realm of medicine and I don't think it's germane to the issues here.

Trial Examiner: I'll overrule your objection, Mr. Gettleman, at this point. There is a charge which uses the words "pep up persons lacking in physical stamina." This Doctor is offered as an expert and this should be a matter of learning within his experience, which he may abbreviate in any way possble. You may answer, Doctor.

119

The Witness: Most any actual physical disease can do that and does it. There are other factors, of course, outside of actual disease involving bad habits of living, including drinking and the after effects of debauches of various kinds, excesses of any kind, a loss of sleep, or too much physical exercise, or overstrain and stresses, mental and otherwise.

By Mr. Manherz:

Q. Would that condition, Doctor,—might that condition be due to lingering diseases, malignant diseases?

A. Yes, that's a common factor in malignant disease, especially the early cases, or infectious cases, such as tuberculosis, the various forms of parasites, diseases such as diabetes, syphilis, pernicious anemia, or any of the secondary anemias, or of deficiency diseases of any kind and various glandular diseases. All sorts of diseases may produce that symptom.

Q. Doctor, having in mind the broad field of causes of lack of this condition—lack of physical stamina, in your opinion, would the use of this incense as directed eliminate those causes

Mr. Gettleman: I'll object to that question for the reason that I previously stated, if the Examiner please.

Trial Examiner: I'll overrule your objection.

Mr. Gettleman: Exception.

120

Trial Examiner: You may answer, Doctor.

The Witness: I feel that the use of the incense as directed will not eliminate the causative factors in loss of energy, or the lack of energy.

Q. Physical stamina—isn't that a synonym of—

A. (Interposing)—stamina—

Q. Physical stamina?

A. Would it improve physical stamina—is that the question? My answer is that it will not.

Q. Will it restore pep?

A. No, it will not restore pep.

Q. Now, Doctor, there is a charge in this case that the use of this product will improve "everything", in the lives of users. Now, Doctor, I wish you would confine the word everything to the field of medicine and health, insofar as health is concerned, would the use of this product, in your opinion, improve that condition of all types of health, ill health?

Mr. Gettleman: Just a moment. My same objection, if the Examiner please. First, that it's calling for the conclusion of the witness in regard to what the Examiner is to ultimately decide. Secondly, it's too broad, it's too vague, and I'll object to his answer.

Trial Examiner: Yes, as a matter of fact I will overrule your objection at this time, Mr. Gettleman. I would sustain it were it not for the fact that that language
121 does appear in the charges. Of course, testimony under that charge will be probably repetitious and duplicitous. But, inasmuch as there is a specific charge in the complaint, I will allow the Doctor to answer and again to abbreviate his testimony on that point as much as possible.

Mr. Gettleman: Exception to your Honor.

Trial Examiner: You may have your exception.

Mr. Gettleman: But I do want to say this, that merely because the charges are set forth in the complaint, which are vague and indefinite and call for conclusions, I don't think that counsel for the Post Office should be given the opportunity to be as vague, or have the witness—the witness' answers be as vague as the charges. I don't think that it is a proper predication. In other words, we've got one vagueness predicated upon another vagueness. But I just wanted to put that into the record for another objection.

Trial Examiner: Yes, I see your point, but I believe in Government counsel's question, he had asked the Doctor to confine his answer in response to the question which involved the word "everything", specifically to medical subjects which may be affecting the health of the user of the product of this incense. You may proceed, Doctor.

By Mr. Manherz:

Q. Doctor, do you recall the question?

A. I believe so. That question was whether or not it would improve "everything" in regards to the living
122 conditions. It involved health and medicine—

Q. (Interposing) And your answer, Doctor—I desire your answer in connection only with the health of the individual, within your expert opinion.

A. Well, the answer is that use of this incense as directed, will not improve the living conditions or the habits and marital status and other financial factors, which undoubtedly do involve health and may produce ill health.

Mr. Manherz: I think that's all the questions, Mr. Examiner.

Mr. Gettleman: If the Examiner please at this time, I want to move that the entire conversation of the Doctor be stricken—the entire testimony of the Doctor be stricken. There's no foundation, there's no factual evidence that the representations here that have been repeated and reiterated by Mr. Manherz have been in fact made. In addition to that, I'd like, without repeating my previous objections—I'd like them to follow and I believe that the testimony of the Doctor should be stricken. I don't think it will help any of us to arrive at any conclusion.

Trial Examiner: I will disallow your motion, Mr. Gettleman. As I have pointed out before, I believe, off the record, if these representations are, in my view, not made then everything concerning them in the way of testimony will have to be disregarded and there will be no case.

But that is something I will have to decide when the 123 transcript is in and the case as a whole is under consideration. And on your other grounds, that too, I overrule. I overrule your motion, too, based on that—

Mr. Gettleman: (Interposing) Well, I do want to say this that I don't believe there's been any foundation, any evidence here whatsoever as to any facts concerning this alleged and proposed scheme to use the mails, knowingly and willingly to defraud anybody. There should be some facts and I say that I believe that the witness' testimony should be stricken. It's just one segment of nothing but you've overruled my objection.

Trial Examiner: Yes, I don't say that—Yes, at this time I cannot rule and cannot determine whether or not, to what extent, if any, the scheme to defraud alleged in the complaint has or has not been proved. Of course, that is again an ultimate fact which I will have to decide when the case is concluded and the record is under consideration.

Cross Examination by Mr. Gettleman.

Q. Dr. Norris, who are you employed by?
A. Federal Food and Drug Administration, Federal Security Agency.
Q. You testify before the Post Office Department regularly, do you not?
A. I have in the past, irregularly, but from time
124 to time over the years.
Q. You mean you've testified irregularly? Is that what you said? I didn't understand it.
A. Well—
Q. (Interposing)—or your attendance was irregular?
A. No, I said my testimony was irregular, I mean—you mean have I testified in each of the years?
Q. Yes.
A. Irregular, as to time.
Trial Examiner: I hope that's what you meant, Doctor.
Q. Dr. Norris, will you tell us when you first saw this direction sheet, regarding the incense?
A. This morning.
Q. That was in—after ten o'clock, after this hearing started, or immediately preceding it—did you not?
A. Yes, sir.
Q. Now, will you tell us this, Doctor Norris? Did you ever burn this Glory Bee incense yourself?
A. No, I have not.
Q. Did you have any experience with it whatsoever, outside of seeing it this morning when court opened?
A. Well, I discussed that yesterday, for some time—
Q. (Interposing) Well, that was my next question. Just answer that question.
A. I never used it or never saw it burned.
125 Will you tell us, Dr. Norris, whether you discussed this question of incense with anybody of the Post Office before coming in the court room?
A. Yesterday, I discussed it with the attorney, Mr. Manherz, for several—for some time. I was shown the formula then.
Q. Was that the first time you saw it?
A. Yes, sir.
Mr. Gettleman: That's all.

Redirect Examination by Mr. Manherz.

Q. Dr. Norris, you were not shown the directions for use yesterday, were you?

A. No.

Q. Was there any suggestion yesterday on the part of Government counsel, Dr. Norris, as to what you should testify to?

A. No.

Mr. Gettleman: I'll object to that unless counsel asks—I'll object to that question. I think it's bad form. It's irrelevant and immaterial.

Mr. Manherz: Mr. Examiner, the purpose of that question is that the previous questions of respondent's counsel, unquestionably had some effect of reflecting on this witness' testimony by making it appear as though the testimony had been prepared yesterday and doctored for this particular case. I submit that—I think that the
126 record should show that the testimony given by this witness is his own and hasn't been suggested by Government counsel in any way.

Trial Examiner: Off the record now for further discussion on this.

(Discussion off record)

Trial Examiner: Is your testimony, Doctor, the result of any suggestion or statement made to you yesterday by Mr. Manherz as to how you should testify today?

The Witness: No, sir. This is my own personal opinion.

Mr. Gettleman: That's all.

Mr. Manherz: That's all, Doctor.

Trial Examiner: You may step down.

Mr. Manherz: At this time, Mr. Examiner, I desire to call to your attention and ask that official notice be taken of the complant in the fraud and lottery docket, case no. 18/5 entitled In the Matter of the Complaint That Alice Perkins, at Chicago, Illinois. I desire that official notice be taken of the transcript—of the sworn transcript of testimony taken at the fraud order hearing as a result of the complaint mentioned, held on April 25, 1949, before this office, at which hearing, Mr. Gettleman, counsel here today appeared and represented the respondent.

Mr. Gettleman: That was Perkins?

Mr. Manherz: The Alice Perkins case, yes, sir. I desire

to have official notice taken of an affidavit executed on
127 June 16, 1949 and filed in this office by Alice Perkins, in the case fraud and lottery docket 18/5. These are taken from the official records of the Office of the Solicitor and in connection with this case—in connection with the testimony heretofore given by Post Office Inspector Means. I submt that this evidence is pertinent and relevant to the issues here and goes to the—is pertinent as a result of the charge contained in paragraph five of the complaint filed in the present case, the Glory Bee Products case. I offer these now for—as—and they have been marked for identification as Government Exhibit 6. They have been withdrawn from the official files in the Office of the Solicitor and they are offered merely at this time for the convenience of the Trial Examiner in connection with my request that official notice be taken of them.

Mr. Gettleman: I'll object to that, if the Examiner please. There's absolutely no evidence whatsoever, none that connects, ties up, or has any legal privity between this respondent and any other respondent that might have been cited by the Post Office. I think it's manifestly unfair and irregular. There is no testimony whatsoever that can possibly hook up this respondent with anybody else, and I'll object to any reference to those documents.

Trial Examiner: Unless you have something further, Mr. Manherz, which tends to establish privity or connects testimony in that Alice Perkins case with something done
or stated or known by this individual respondent, I
128 can't see the validity of your motion.

Mr. Manherz: Well, Mr. Examiner, the testimony already in very definitely shows that this business and the Alice Perkins business was owned by the same person.

Mr. Gettleman: (Several words not transcribable)—Excuse me, go ahead.

Mr. Manherz: Mr. Means has testified to that and furthermore the testimony in the transcript of the Alice Perkins case definitely shows that Mr. Cates was the owner of that business and the testimony shows that he is the owner of this business. Mr. Means has testified that Mr. Cates told him on November 29, 1949, that he was familiar with the affidavit filed by Alice Perkins and he was aware of its execution and filing and since the testimony and the evidence shows and will show that Mr.

Cates owns both the Alice Perkins business, that she was merely an employee or agent of Mr. Cates and that he was familiar with the execution of the affidavit in connection with the operation of Alice Perkins business, and the testimony shows that he is also the owner and operator of the Glory Bee Products business, I think there is no question from the evidence and testimony already in that both businesses are owned and operated by the same person, namely, Mr. Cates. I submit that this evidence is quite pertinent. It is not evidence, it is merely an examination and review by the hearing examiner of these official files.

That, I think, can be done without even any motion
129 to do so. But so that the record may be clear, the Government makes the motion that the Government take official notice of the Alice Perkins file. Of course, if the record does not show that Mr. Cates is the owner and operator of both these businesses, the Examiner's reference to the exhibits mentioned in the Alice Perkins case would indicate—so indicate and it would result, of course, in the Government's failure to establish this charge. I submit, however, that testimony already in this record and the files of the Trial Examiner in the Alice Perkins case will show the relevancy of this file and its bearing on the present, Glory Bee Products case.

Mr. Gettleman: If the Examiner please—Basically and primarily, there is no such charge here in the complaint even, outside of the objectional features I pointed out. The complaint says this: "It is further charged that the operation of the enterprise as set forth herein is in violation of the terms of the affidavit executed on June 16, 1949, and filed with the Solicitor of the Post Office Department." I submit, if the Examiner please, there's not one scintilla of evidence that shows any legal privity or any privity at all that should be taken countenance of in any legal matter between these respondents, the Glory Bee Products and Glory Bee and one person named Alice Perkins; although she was an employee. I submit there's nothing been offered here of any evidentiary bearing and I'll again object to any reference thereto.

130 Trial Examiner: Do you wish to be heard any further, Mr. Manherz?

Mr. Manherz: Mr. Examiner, in that connection I'd like to call your attention to the testimony in the transcript of—

Mr. Gettleman: I'll object to that if the Examiner please. I mean, that's highly irregular. There's been no proof here—

Mr. Manherz: (Interposing) Mr. Examiner—

Mr. Gettleman: (Interposing)—that there was a connection between them.

Mr. Manherz: That's the idea of offering this transcript. It is the proof that there is privity, that it is the one and the same person that operated both businesses and if the Examiner is not permitted to refer to his own file to determine that fact, I'd say there was something wrong with the operation of this work. The Rules of Practice here certainly permit the Trial Examiner to examine his own files.

Trial Examiner: Mr. Manherz, pardon me, who did execute that affidavit on June 16, 1949?

Mr. Manherz: Mr. Examiner, Alice Perkins executed the affidavit insofar as we know. It's signed Alice Perkins, by that name. But the testimony in the transcript of the Alice Perkins case shows clearly that she was acting for Mr. Cates and that the business was really that of the Standard O and B Company which is owned by Mr. Cates, and that they decided to operate the business because 131 of—she signed certain letters for the O and B Company and she got letters addressed to Alice Perkins from patrons of the O and B Company and in view of that fact, they decided so there would not be any—so that she could handle these orders that they would use the name Alice Perkins.

Mr. Gettleman: If the Examiner please, number one I'd like to say this. Mr. Manherz says he presumes, or he doesn't know who signed the affidavit. That in itself is an unfair statement. The affidavit is under oath, it's sworn. The O and B Company was not a respondent in the other case. There was only one respondent and that was one person named, Alice Perkins. I submit again that there has been absolutely no proof of any privity. As a matter of fact, there isn't any between this respondent and respondent mentioned in some case that Mr. Manherz brings out now. And I think any and all references to it are irrelevant, immaterial, should not be brought to your Honor's attention and it's not legal evidence, predicated upon any factual evidence adduced here at this hearing.

Trial Examiner: Well, gentlemen, I think I see the picture, albeit under a glass darkly, at this point. There's no question about the right of the Examiner to refer to files in this office for any purpose suitable to him. There is a grave question though which I cannot determine at this moment; whether an examination of the files that Mr.
Manherz brings to my attention would have any legal
132 efficacy or substantive legal value in proving the allegation, the general allegation under paragraph five of the complaint. Rather than to extend the argument, and since the views of you gentlemen, respectively, have been enunciated on the record, I will, as requested by Mr. Manherz, examine the transcript and the affidavit involved in the Alice Perkins case and I will have in mind the objection voiced by respondent's counsel and the views advanced by Mr. Manherz. If I find or if I fail to find rather that that transcript, or that affidavit, or that complaint, or those files supply evidence tending to establish, shall I say hypothetically, intent on the part of Mr. Cates, the individual respondent in this case—he'll not be prejudiced by my examination of those files. Not having examined the files, and not wishing the record to be cluttered in extenso with quotations therefrom, I cannot, of course, state pro or con at this moment to what extent my recommendations may be influenced by examination. But unless, in my considered judgment, there is something in that transcript and in this present evidence that tends to establish legal privity between Perkins and Cates and knowledge on the part of Cates that these representations, assuming they too were made, are false or a basis for assuming or imputing to him knowledge that they are false or fraudulent, then as I stated before, Mr. Cates will not have been prejudiced by my examination. Further than that I cannot go at this time.

Mr. Gettleman: I may say this to enlighten your
133 Honor that the literature is that of Glory Bee, the ad is of this respondent, Glory Bee. All of the written and printed matter is of Glory Bee and I again refute that there is no relationship, no evidence to substantiate any relationship in this case between this respondent and one, Alice Perkins. I just wanted to bring those facts out.

Trial Examiner: I want your views on the record, Mr. Gettleman and anything else you have to add to those views you may do so at this time, as well as Mr. Manherz.

Do you have anything further to add to the record on this point, Mr. Manherz?

Mr. Manherz: No, Mr. Examiner, that's all except that the comments I previously made as to the statements in the transcript of the Alice Perkins case and the test which showed that she was acting for Mr. Cates and the testimony of Inspector Means this morning which shows that Mr. Cates was familiar with the affidavit of Alice Perkins and aware of it; that she was his employee then as she is his employee now and that he has continued to operate the same business but instead of under Alice Perkins, has resumed it under the name of Glory Bee Products. I think the testimony of Inspector Means and the testimony in the Alice Perkins case will clearly show the relevancy and the connection and I think that it sustains that charge.

Trial Examiner: Well, without prejudging that particular charge either way, I understand that that affidavit, and the complaint so states, was executed on June 16, 1949, and filed with the Solicitor of the Post Office Department by Alice Perkins of Chicago, Illinois by that
134 name, that is Alice Perkins. It would, therefore, seem to me, thinking out loud, and again I say, nothing that I say is supposed to forestall or prejudge the evidence so far; that it would be incumbent upon the Government to establish now that Alice Perkins is also operating this particular enterprise and that Mr. Cates is just a front man, if I may use the colloquialism.

Mr. Gettleman: That's right.

Trial Examiner: That's my view now, but I say that I will consider those points later on when I go into this thing more carefully.

Mr. Gettleman: We're on the record, are we not?

Trial Examiner: Yes, we are.

Mr. Gettleman: Yes, thank you. Well, what Mr. Manherz is trying to do is trying to show, trying to offer some proof into this case on some theory that that which occurred in some other case has a relationship back to this case. In other words, starting out logically, if he had attempted to or if he thought that there was any connection between this respondent and Alice Perkins, it should have been done from this case back to the other case. Because, after all, we've got to go upon the evi-

dence and the facts as adduced here. But I submit that Mr. Manherz' offer is objectionable and I object to it.

Trial Examiner: Well, I have already stated my position. I will consider those records, Mr. Manherz.

Mr. Manherz: Mr. Examiner, may I make one statement?

Trial Examiner: Yes, do.

135 Mr. Manherz: I feel that the record in the Alice Perkins case clearly showed that Alice Perkins was acting for and was, in fact, an employee and agent of Mr. Cates and for no one else. The testimony uncontroverted in the Alice Perkins case clearly shows that. Now we have here another enterprise operated by Mr. Cates, the very same Mr. Cates and the very same scheme. He was in the previous case the situation is not that he was the front man, it's that Mr. Cates had Alice Perkins act as his front man.—If a woman could act for a front man—and he's still a front man and has been the operator all along; except that he, in the previous enterprise, had Alice Perkins' name used and now he has the name of Glory Bee Products used. The evidence clearly shows that he was then the owner and operator of the enterprise under Alice Perkins. He was and is the owner and operator of the business under the name, Glory Bee Products and the testimony of the Inspector in this case and the evidence in the record of the Alice Perkins case clearly and definitely establishes that fact, Mr. Examiner; as principal and agent in the Alice Perkins case and as principal solely in the present Glory Bee Products case.

Trial Examiner: And you are arguing that the action of the agent—

Mr. Manherz: (Interposing)—agent binds the principal.

Trial Examiner: —in the Alice Perkins case, willy nilly, binds (strike that willy nilly)—on the basis of
136 Inspector Means' testimony, at least in this case, in substance or in effect binds Mr. Cates and ipso facto imputes to him or establishes rather that his operation now is in violation of the other Alice Perkins affidavit.

Mr. Manherz: Mr. Examiner, my understanding of the law is that the acts of the agent always bind the principal unless the principal comes out and directly countermands them or denies them in some way. And in this case and

the Alice Perkins case, the principal has never attempted to overrule the action taken by Alice Perkins.

Mr. Gettleman: What principal? I don't know what principal you're talking about.

Mr. Manherz: Mr. Cates—

Mr. Gettleman: (Interposing) We have no evidence here, Mr. Manherz. It is manifestly unfair for you to read or read in to some other case that just happened to be before this Department in which an affidavit was signed, and impute the actions of respondent of that case into this case. We have no evidence here. As a matter of fact, we have evidence to the contrary by Mr. Means.

Trial Examiner: That Alice Perkins is not in fact connected with the operation of the incense department, I believe?

Mr. Gettleman: That's right.

Trial Examiner: Well, I have allowed you gentlemen to argue your views upon the record for my own guidance and I hope it might when I come to the ultimate act of considering the case as a whole. And so I believe
137 I've heard enough to get a pretty good picture of what you're driving at on each side. I will be guided accordingly in my consideration of the case. Now, have you anything further?

Mr. Manherz: The Government rests.

Trial Examiner: Government rests.

Mr. Gettleman: If the Examiner please, very briefly, I want to state that I don't believe that the Government proved its case in accordance with the terms of the charges, as set forth in the complaint here. This is a very serious complaint. The penalty is a serious one. It deprives a person of his business, deprives him of the use of the mails to perpetuate that business which is guaranteed to him by the Constitution, guaranteed to all of us. I think now, it has been well established by law in Reilly *vs.* Pinkus and the complaint, inserting the two words, evidently following the case of Reilly *vs.* Pinkus in which it alleges that the respondents here knowingly, falsely or fraudulently caused the dissemination of the advertisements and the literature accompanying the advertisements. I submit that not one, not a single scintilla of factual evidence has been adduced in this court room today, to substantiate the claims or the charges as set

forth in the complaint. Now, fraud which is an integral part of this complaint is not to be presumed. It's a *serious charge. It's as serious as criminal intent* and without reading your Honor law at this time, unless you want it, I submit that there hasn't been a case made out here and I think the complaint should be dismissed. I'd like to give your Honor the law upon the subject of
138 fraud and intent, unless we're going to overrule the Reilly *vs.* Pinkus case. I don't think we have a case here.

Trial Examiner: Well, your motion is made and is a part of this record, Mr. Gettleman. Of course, as you know, I cannot act at this time, pro forma, upon your motion. Our practice is to consider it when the case as a whole is in. You may choose not to present any testimony from respondent or rest on your motion at this time, if you so desire, as you well know. As to citations of the law, I don't pretend to know all the law on the subject but I'll tell you this much. Since Pinkus *vs.* Reilly came down from the Supreme Court, it has become the guiding light, the vade mecum, for the establishment of cases under the statutes now concerned and I believe that's what you probably wish to offer in any event, at length. I have that decision in my office which I go by very carefully and will certainly apply it so far as practical to the facts in the case now before me. That, of course, will save time and additional space on the record, if you are satisfied that I can and will apply that case within its pratcical realms and intended effects upon the evidence now in this record.

Mr. Gettleman: Yes, of course. Now, I would like this —As I understand it, the Government has rested, definitely. May we have a recess for about three minutes?

Trial Examiner: Yes.

Mr. Gettleman: Thank you.

(Short recess taken)

139 Trial Examiner: I have asked Government counsel to state for the record, his position with respect to proof of charges—rather proof of their falsity or fraudulency of charges 4 b, c, d, e, g and j.

Mr. Manherz: Mr. Examiner, the Government contends that in those cases the representations are so ridiculous and foolish and so improbable that evidence of their falsity need not be offered and in that connection, I would

like to call the Examiner's attention to the following cases. The first is Quock, Q-u-o-c-k, Ting, T-i-n-g, against *United States, reported at 140 United States 517; the case* of U. S. against Reid, R-e-i-d, reported 42 Federal, page 134.

Mr. Gettleman: What was the page number?

Mr. Manherz: 134; the case of Carpinelli against Reading Company, reported 158 Atlantic, page 67; and the case of Birney, B-i-r-n-e-y, against Illinois, reported at 70 Northeastern, page 743.

Trial Examiner: Very well—We're on the record now. (Off record)

Mr. Gettleman: If the Examiner please, upon reading of those citations to support the charges upon which no evidence has been adduced here, whatsoever, the respondent rests. We will not offer any evidence at this time—any evidence.

Trial Examiner: You will not offer any evidence?

Mr. Gettleman: Any evidence.

Trial Examiner: And you now rest?

Mr. Gettleman: Correct.

140 Trial Examiner: Anything further by way—anything further from the Government?

Mr. Manherz: Nothing further from the Government.

Trial Examiner: Gentlemen, what are your wishes with respect to argument in this matter?

Mr. Manherz: As far as the Government is concerned, Mr. Examiner, I feel that no argument is necessary.

Trial Examiner: What are your wishes, Mr. Gettleman?

Mr. Gettleman: My argument in this matter, if the Trial Examiner pleases, will be a lengthy one. I'd rather submit it in brief form because I'd repeat it in brief anyway, if that's agreeable with you.

Trial Examiner: Yes, I think that would be and is very agreeable to the Examiner, Mr. Gettleman.

Mr. Gettleman: Thank you.

Trial Examiner: You will be allowed that opportunity to submit your argument and contentions in matters of law in a brief. Now, let me ask you this, Mr. Gettleman, in the interest again of conserving time and having in mind the present load upon our transcription section, will you require the transcript of proceedings before you for the purpose of enabling you—

Mr. Gettleman: (Interposing) I think I should have

because I don't want to be incorrect on the smallest detail here, if the Examiner pleases. I'd like to be correct as to every statement or any reference to any of the testimony as given previously by the two witnesses and I think I should have a copy of the transcript in this matter. I waive that frequently, but this situation is a little different. I'd like to have it.

141

Trial Examiner: Well, I certainly want you to have a copy before you if you feel that you need it to enable you to make your best—

Mr. Gettleman: (Interposing) Yes.

Trial Examiner: —presentation.

Mr. Gettleman: Thank you, yes.

Trial Examiner: Very well, gentlemen, if there be nothing further from either the Government or respondent and I assume now there is nothing further, the record may show that at approximately 12:17 the hearing before me was adjourned with the understanding previously expressed that respondent will be afforded an opportunity upon the completion of the transcript and on the basis of a copy thereof which will be furnished him in due course, to file any statement by way of argument or brief in support of his case, that he may desire. The time for the filing of that brief will be stated in my correspondence with the respondent, again, later on.

(Whereupon, the hearing adjourned at approximately 12:17 o'clock p.m., on Wednesday, March 22, 1950.)

Every Letter and Excerpt of a Letter Printed Here Was Written to GLORY BEE The Original Letters We Have on File Here in Our Office. Our Products Are Sold Only for What They Actually Are.

YOU BE THE JUDGE

READ Maybe You'll Be Convinced!

We produce these personal excerpts from users of Glory Bee FAST LUCK Brand Incense and here print their sincere, heartfelt emotions of thankfulness. Please read them, and then decide if you too, should try for better LUCK according to the belief and symbols of age-old legends, known and believed by a multitude of men and women—and often lonesome, unhappy souls.

F488—I have never used anything like GLORY BEE FAST LUCK Brand Incense in my life before. It gave me a refreshing memory. It made me feel as much at Peace in mind and spirit. It looks like everything will work as well with me. I don't ever want to be without it as it is a wonderful Incense. I am telling my people about it. Send me another Pound by return of mail.

F489—I will write you these few lines to let you know how I am enjoying your wonderful Incense Powder. It is the best I ever used. I thank you for it. I gave no more power. I am getting along fine. Send me another POUND.

F496—My order of FAST LUCK Brand Incense with its added Gifts of Incense burning numbers that came out in the cubes. I must tell you that I have been sick and so not able to write you that I feel lucky again to be about. May God bless you.

F485—Only a few lines to let you know I received my Goods from you all O.K. and am feeling much better now since using them and everything is just working out fine for me now and I do thank you so much for your kindness. As ever your friend.

F486—Very glad to get my shipment of FAST LUCK Brand Incense and the other Gifts it contained. Found it all to be just what you said it would be.

F497—I been aiming to write you before now. Don't think hard of me for not writing you sooner. I got the package you sent to me and everything in it is good for me. I think I am doing fine and feel lucky in all things.

F498—Please send me another Pound Package of FAST LUCK Brand Incense Powder. It is the best I ever tried. I am very much pleased. It was $3.00. Please ship C.O.D. and not a Penny more to Pay.

F499—The FAST LUCK Brand Incense is working fine for me. Thank you for it.

F450—I feel the best I ever have since I been in this world. I thank YOU very much for it.

F451—I am writing you to let you know how much I am enjoying your FAST LUCK Brand Incense. It is really good. I have recommended it to so many people that I have gotten you several customers. They are sending in their orders right away. The Numbers in the Incense comes right out. I just can't help but feel Luck is coming my way. You send this new order right away C.O.D. $3.00. Not a Penny More To Pay. And I am thanking you again.

F452—I am getting along fine and all my family seems to be doing better. We are enjoying the FAST LUCK Incense to the highest. I really do thank you from the bottom of my heart for sending it to us. Life is brighter and the home is more cheerful since using your Incense Powder and the fumetination Incense Tablets that burn out numbers. In every respect we are more happy and enjoy new made friends since I have been dealing with you—everything going better.

THESE TWO COLUMNS OF TESTIMONIALS

F453—I received the One Pound package of your FAST LUCK Brand Incense sometime ago and it has certainly given joy and much happiness to my little family and myself. So much so that I am sending for another POUND. The price was $3.00 and not a Penny More To Pay. Thanking you again.

F454—I am glad to say that I got very much satisfaction and such good results as I had hoped for from the FAST LUCK Brand Incense that you sent me a while ago. I like burning Incense, because it calms my mind and makes me sleep well. It does very wonderful for Home use, too. Send me another shipment of this Incense. Also, the Dream Book and the Candle Burning Book. I will be glad for you to use my name for Advertising your Goods.

F455—Your FAST LUCK Brand Incense is the best I ever used. One thing I want to know—how did you ever get my name and address? Anyway, it's the answer to my prayers. Thanks to the Incense for I believe it helped me out. You can see I love it, by me sending in for more. Send me my order as fast as the mails can bring it to me. Your customer.

F456—My dearest friend. Let me tell you how I feel and believe the FAST LUCK Brand Incense helped in my daily life and home. The quietness and the calmness that comes over me while burning the Incense, seems like a dark cloud has passed over and then I begin to see the light. It seems like everything has gotten brighter to me. I can then relax. I can think better. I can't explain the feeling in words: but I thank God for giving me such help. Only God knows what I have been going through. I feel so much better now. Thanks again to you for the blessed FAST LUCK Brand Incense that has given me so much help.

F457—How I love to hear from you. I just feel I got a real friend. I have been very lonely. I have had a very hard life. When I get the letter you sent to which need—Don't give up! I said to myself,—I will try again. I will write you a nice long letter sometime and explain a lot of things. I sure have that peace of mind at home now and everything is quiet at home. I am using this FAST LUCK Brand Incense and maybe I want to send for something else, too.

F458—Just a few lines to let you hear from me. I ordered a Pound of your FAST LUCK Brand Incense a few weeks ago and I want you to know it sure try it—Try it your way! Decide for yourself what there is to these age-old beliefs and folklore traditions so dear to so many of us. Remember these products are only sold for what they actually are. We make no claim as to supernatural powers nor do we claim your luck will change or that your wishes will be fulfilled.

F459—Just a few lines to let you know I am very much in love with your FAST LUCK Brand Incense. Please send another package. I hope to hear from you soon.

F460—I have used some of the FAST LUCK Brand Incense and like its fragrance very much. I gave a friend some and she likes it too. I find that faith, hope and belief will change life for anybody.

F461—I am thanking you for this FAST LUCK Brand Incense. It has helped me so much. Before you told me about it—I was so worried, but ever since I got this Incense everything is O.K. and I want to thank you very much and I never shall forget you. Please send me another $3.00 order just as quick as you can.

F462—I was recommended to you by a friend. She told me about your FAST LUCK Brand Incense. Please send me one pound of the Incense by C.O.D. Mail. Total to pay $3. Not a Penny More.

F463—I really know for myself that you have the best quality of Incense. I would like very much to have another supply before my other gives out. So send it C.O.D. Total to pay $3. Not a Penny More.

F464—Please send me some more FAST LUCK Brand Incense. It has been very helpful. Be sure you send me the very same thing.

F465—I received the Incense and have been happy since I have been using it. I am very pleased and use it every nite.

F466—I received the FAST LUCK Brand Incense and I like it fine, and by the help of the Lord, I will send you another order again very soon.

F467—I have been so helped by my using your FAST LUCK Brand Incense. I just had to tell you of its wonderful effect on me. Everything has surely improved since using it. Thanks to you so much for getting in touch with me.

made things change for me. I am very happy and I am lifted high in spirits, too. This is the best Incense I have ever used. I am telling all my friends about it. And, one of them is sending for a Pound today. I want to use it as long as I can get it. I cannot put in words how much I thank you for telling me about this wonderful Incense.

Govt. Exhibit 8-C

THOUSANDS SAY TO YOU!
I HAVE BECOME RICH In Real Happiness!
DON'T YOU GIVE UP!
YOUR LUCK MAY CHANGE According to Age-Old Beliefs...Into Success, Home Contentment and LOVE!
HAVE UNCROSSED BAD CONDITIONS!
The SOCIAL MAJESTY THAT OFTEN ACCLAIMS OUR HOPES IN LOVE AND ROMANCE
LET POWER and GLORY BE OUR AIM FOR EVER and EVER!
Your experience may not be the same as those users. Remember we sell our incense only for what it actually is. We absolutely make no supernatural claims for our products. We make no claims that your luck will change or that your wishes will be fulfilled. We do Guarantee the full Value of our Products or refund your money if you are not delighted. Send your order in TODAY!
GLORY BEE PRODUCTS

144 And on the same day, to wit, on the 19th day of September, 1950 being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

145

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

It Is Ordered by the Court that the motion of the plaintiff for a temporary restraining order be and it is hereby reset for hearing to September 25, 1950.

146 And afterwards, to wit, on the 25th day of September, 1950, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

147

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

This cause coming on for hearing on the motion of the plaintiff for a temporary restraining order come the parties by their attorneys, respectively, and the Court having now heard the arguments of counsel and being fully advised in the premises, it is

Ordered that said motion be and it is hereby overruled, and it is

Further Ordered that this cause be and it is hereby set for hearing on plaintiff's motion for permanent injunction on October 6, 1950.

said order denying the prayer of plaintiff for an injunction against defendant, as Postmaster of the City of Chicago, carrying out the terms of a "Fraud Order" theretofore issued on August 16, 1950 by the Postmaster General, and said order of the Judge of this Court further finding that proceedings under Sections 259 and 732 of Title 39 U. S. Code are not within the provisions of the Administrative Procedure Act and dismissing plaintiff's Complaint at plaintiff's cost, and from the whole thereof.

Frank E. and Arthur Gettleman
Edward Brodkey
By: Edward Brodkey
Attorneys for Samuel D. Cates,
Plaintiff and Appellant

10 S. LaSalle Street
Chicago 3, Illinois
Randolph 6-6726

(Attached hereto is the certificate of mailing):

154 United States of America }
Northern District of Illinois } ss

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on November 10, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to

Hon. Otto Kerner, Jr.
U. S. Attorney
45 U. S. Court House
Chicago 4, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 10th day of November, A. D. 1950.

Roy H. Johnson
Clerk
by Gizella Butcher
Deputy Clerk

(Seal)

155 Know all Men by these Presents:

That we, Samuel D. Cates, as principal, and Glens Falls Indemnity Company, a corporation, as sureties, are

held and firmly bound unto John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois, in the full and just sum of Two Hundred Fifty and no/100 Dollars ($250.00) to be paid to the said John Haderlein, as Postmaster aforesaid, his attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 10th day of November in the year of our Lord one thousand nine hundred and Fifty.

Whereas, lately at a session of the United States District Court for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between Samuel D. Cates, trading as Glory Bee Products and Glory Bee, plaintiff, and John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois, Defendant, a final order was rendered against said Samuel D. Cates, plaintiff, and the said Samuel D. Cates, plaintiff, having filed in the Clerk's Office of the said District Court Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, to reverse the said final order of the aforesaid suit, in the United States Court of Appeals for the Seventh Circuit, to be holden at Chicago within forty (40) days from the date hereof.

Now, the condition of the above obligation is such, that if the said plaintiff, as aforesaid, shall pay the costs if the appeal is dismissed or the final order affirmed, or pay such costs as the appellate court may award if the order is modified then the above obligation to be void; otherwise to remain in full force and virtue.

Samuel D. Cates (Seal)
Glen Falls Indemnity Company (Seal)
By Carlisle M. Strening
Attorney

Sealed and delivered in presence of:
Frank E. Gettleman

156 And on the same day, to wit, the 20th day of November, 1950 came the Appellant by his attorneys and filed in the Clerk's office of said Court his certain Statement Of Points On Appeal in words and figures following, to wit:

157

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

STATEMENT OF POINTS ON APPEAL

Plaintiff, as Appellant herein, having filed notice of appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment order of the Court, states that the points upon which he intends to rely on the appeal in this action are as follows:

1. That the Court erred in finding that "fraud order" issued by the Postmaster General on August 16, 1950, against plaintiff herein, together with the findings upon which said "fraud order" was based, were supported by substantial evidence.

2. That the Court erred in not finding that said fraud order was manifestly against the weight of the evidence.

3. That the Court erred in not finding that the findings of the Trial Examiner of the Post Office Department, as to the facts, together with his recommendations with respect thereto are not supported by the evidence.

4. That the Court erred in not finding that said Trial Examiner's findings and recommendation are not sufficient in law to sustain the "fraud order" of the Postmaster General.

158 5. That the Court erred in not finding that the testimony and entire record of proceedings before the Post Office Department showed that the plaintiff had not been and was not then receiving money through the mails by means of false and fraudulent pretenses which are "knowingly false and fraudulent" as charged in the Complaint in said administrative proceeding or any other.

6. That the Court erred in not finding that the Trial Examiner of the Post Office Department in the conduct of the administrative proceeding before that department

and in making his findings of fact, and the Solicitor of said Department in adopting them, as well as the Postmaster General in his issuance of the "fraud order" subject of this suit, has each demonstrated his respective bias in judging the facts presented by the record.

7. That the Court erred in finding that the Federal Administrative Procedure Act of 1946, (60 Stat. 237, 5 U. S. Code Annotated, Sec. 1001 et seq., as amended) and particularly but without limitation Sections 2, 5, 7, 8 and 11 thereof were inapplicable to the conduct of proceedings by the Postmaster General for the issuance of a "fraud order" under Title 39 U. S. Code, Sections 259 and 732.

8. That the Court erred in not finding that such proceedings described in point 7 above, when conducted by the Postmaster General, are required to be conducted in accordance with the provisions of said Administrative Procedure Act and that if such be not done, the said proceedings including any findings or order resulting therefrom are accordingly void and of no force and effect.

9. The Court erred in overruling (sic) plaintiff's motion for a preliminary restraining order.

10. The Court erred in denying plaintiff's motion for a temporary or permanent injunction herein.

159 11. The Court erred in dismissing plaintiff's suit herein.

12. The Court erred in not finding that the Postmaster General did not have jurisdiction to issue the original complaint in the administrative proceeding and that there was no jurisdiction so to do.

13. The Court erred in not finding that the Complaint in the proceeding herein before the Post Office Department does not allege facts sufficient to give the Postmaster General jurisdiction over the plaintiff or this type of case.

14. The Court erred in not finding that there had been no prior valid finding that such a "fraud order" proceeding would be in the public interest.

15. The Court erred in not finding that the Trial Examiner and the Solicitor of the Post Office Department on approval of said Trial Examiner's findings, erroneously and without basis of fact found that one Alice Perkins, an employee of plaintiff herein in the conduct of other en-

terprises, as a consequence thereof had such privity with plaintiff herein in the conduct of his instant business as to entitle said Trial Examiner to take official notice of the records in another case before said Post Office Department involving said Alice Perkins alone.

16. The Court erred in not finding that the Trial Examiner of the Post Office Department quoted in his findings of the Facts only from the government's testimonial evidence and exhibits and not from the exhibits and testimonial evidence adduced by plaintiff herein; specifically, but without limitation, that said Trial Examiner ignored the testimony of one William J. Means, a Postal Inspector, who testified for the government in said administrative proceeding that plaintiff had told him that said Alice Perkins was not employed by plaintiff in connection with the business subject hereof.

17. The Court erred in not finding that the Trial Examiner of the Post Office Department and the aforesaid Solicitor thereof erroneously and without basis of fact
160 found that the incense and numbers tablets subject of this proceeding possessed no property not possessed by any other ordinary incense generally; and erroneously inferred and concluded from such finding that such products did not possess the qualities or characteristics described by plaintiff in his advertisement.

18. This Court further erred in not finding erroneous and without basis of fact the finding of the Trial Examiner that the advertising literature of plaintiff was "designedly worded and composed so as to appeal to persons possessing" superstitious beliefs.

19. The Court herein erred in not finding unreasonable and illogical the inference drawn by the Trial Examiner of the Post Office Department herein and contained in his findings that in view of the background of plaintiff, his commercial motive (concerning which there was no evidence) and certain other nebulous and unidentified circumstances alluded to in said findings that plaintiff herein did not believe in luck.

20. This Court erred in failing to find that the Trial Examiner and the Solicitor aforesaid had erroneously and without basis of fact found, concluded and inferred that since plaintiff herein had conceded that the use of incense "would not cure any disease, chronic or otherwise, or improve the health of users thereof, leaving out the mental aspect" (emphasis supplied), the said plaintiff

thereby demonstrated that any representations he might have made in his advertising was therefore "knowingly false."

21. This Court particularly erred in failing to find that the aforesaid Trial Examiner and Solicitor had erroneously and without basis of fact found and concluded that plaintiff herein was not selling his products "for what they are, without lying about them", in identical manner as appears to have been done in Dolan *vs.* Hurley, 283 Fed. 695, affd. 297 Fed. 825, upon which decision plaintiff relies.

22. Both this Court and the Trial Examiner afore-
161 said erred in refusing to follow the decision in said case of Dolan *vs.* Hurley, supra, and, in effect, finding that decision inapplicable to the case at bar.

23. The Court erred in failing to find erroneous the conclusion of the Trial Examiner aforesaid that if plaintiff had used so-called "disclaimers" of any claim to supernatural power for his product, such use, ipso facto, proved that plaintiff's representations were knowingly false.

24. The Court erred in not finding that the Trial Examiner aforesaid had erroneously, arbitrarily and without basis of fact or evidence found that plaintiff herein had vouched for the accuracy of the legend surrounding the use of incense and associated products, that they would bring their users luck.

25. This Court erred in failing to find erroneous the conclusion of the aforesaid Trial Examiner that if certain unsolicited testimonials of users of plaintiff's product were included in plaintiff's advertising, it therefore follows as a matter of course that his representations must be "knowingly" false.

26. The Court herein erred in not finding erroneous the finding of the Trial Examiner, Solicitor and Postmaster General aforesaid that plaintiff's (now appellant's) advertising claims for his product "are completely opposed to common knowledge and experience; that "their falsity may be inferred from their preposterous character"; and that plaintiff's fraudulent purpose to deceive his customers is "self-evident".

27. The Court erred in failing to find that the Trial Examiner of the Post Office Department had erroneously

admitted irrelevant, incompetent and immaterial testimony offered on behalf of the government, during the course of the administrative hearing.

162 28. The Court erred in not finding that the Postmaster General had erroneously made his "fraud order" too broad.

29. The District Court erred in not finding that the proceedings herein before the Post Office Department, as they are conducted, denied this appellant a fair hearing and due process of law in the procedure of said administrative agency, and that its findings and order cannot therefore be made effective without depriving plaintiff of his property without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

30. The Court erred in not finding that the Trial Examiner of the Post Office Department had improperly taken official notice of matter unpublished and otherwise unavailable to plaintiff and neither the subject of common notoriety and undeniable truth nor as to which he had any opportunity to cross examine or refute.

31. The Court erred in not finding that the findings of the Postmaster General are not supported by any evidence, are arbitrary and transcend the Postmaster General's constitutional and statutory powers, and are accordingly void and of no effect; that the fraud order being necessarily based on said invalid findings is likewise void and of no effect.

Frank E. and Arthur Gettleman
Edward Brodkey
By Edward Brodkey
Attorneys for Appellant
10 S. LaSalle Street
Tel. RA 6-6726

Received a copy of the above
and foregoing Statement of
Points on Appeal this 20th
day of November, 1950 at 10:15 A.M.
Otto Kerner, Jr. JWD
Attorney for Appellee

163 And afterwards on, to wit, the 20th day of November, 1950 came the Appellant by his attorneys and filed in the Clerk's office of said Court his certain Designation Of Portions Of Record To Be Contained In Record On Appeal in words and figures following, to wit:

164

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 50 C 1220) • •

DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL

The Clerk will please prepare a Record on Appeal herein. Appellant designates the following portions of the record to be contained in the Record on Appeal in the above entitled action:

1. The caption, statement showing time of commencement of suit, names of parties, time of hearing, name of judge hearing same, the date of the final order and the date appeal was taken, all in accordance with Rule 10 (b) of the United States Court of Appeals for the Seventh Circuit.

2. The complaint filed August 3, 1950, together with all exhibits thereto attached.

3. Notice of motion for preliminary restraining order and temporary and permanent injunction filed August 31, 1950.

4. Summons filed August 30, 1950.

5. Return of officer showing service of summons herein filed September 7, 1950.

6. Order of Court dated August 31, 1950, setting
165 plaintiff's motion for preliminary restraining order and injunction for hearing on September 5, 1950.

7. Order of court dated September 5, 1950, continuing plaintiff's motion for injunction to September 19, 1950, and giving defendant two weeks to answer.

8. Answer of defendant filed September 19, 1950, together with all exhibits thereto attached or appertaining, including specifically, but without limitation,

the transcript of proceedings theretofore had before a Trial Examiner of the Post Office Department.

9. Order of court dated September 19, 1950, continuing the hearing of plaintiff's motion for restraining order and injunction to September 25, 1950.

10. Order of court dated September 25, 1950, overruling plaintiff's motion for preliminary restraining order and setting the matter for hearing on plaintiff's motion for permanent injunction on October 6, 1950.

11. Order of court dated October 6, 1950, reciting that motion was argued and matter taken under advisement by the court.

12. Order of court dated October 27, 1950, (draft) denying plaintiff's motion for injunction and dismissing complaint at plaintiff's cost.

13. Notice of Appeal filed November 10, 1950.

14. Plaintiff's cost bond on Appeal filed November 10, 1950.

15. This designation of portions of the record to be contained in the Record on Appeal.

16. Statement of points upon which appellant intends to rely in this appeal.

17. Any designation by appellee of additional matters to be included in the Record on Appeal.

18. All further papers and proceedings after this designation is filed.

Frank E. and Arthur Gettleman
Edward Brodkey
By Edward Brodkey
Attorneys for Appellant
10 S. LaSalle Street
Ra. 6-6726

Received a copy of the above
and foregoing Designation of
Appellant this 20th day of
November, 1950, at 10:15 A.M.
Otto Kerner, Jr.
Attorney for Appellee

166 And afterwards on, to wit, the 28th day of November, 1950 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

167

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

STIPULATION

It Is Hereby Stipulated and Agreed by the parties hereto, by their respective attorneys, that all original exhibits attached to plaintiff-Appellant's Complaint and Defendant-Appellee's answer thereto heretofore filed in this cause, in lieu of copies of same, be included in the Record on Appeal and transmitted by the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, to the United States Court of Appeals for the Seventh Circuit.

Frank E. and Arthur Gettleman
Edward Brodkey
By Edward Brodkey
Attorneys for Plaintiff-Appellant
Otto Kerner, Jr.
Attorney for Defendant-Appellee

168 And on the same day, to wit, on the 28th day of November, 1950, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

169

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

ORDER

On stipulation of the parties hereto, by their respective counsel, and the Court being fully advised in the premises, it is hereby

Ordered That leave be and the same is hereby granted appellant herein to include all original exhibits attached to plaintiff-appellant's Complaint and defendant-appellee's Answer heretofore filed in this cause, in lieu of copies of same, in the Record on Appeal herein and the same may be transmitted by the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, to the United States Court of Appeals for the Seventh Circuit.

Enter:

Igoe
Judge

Dated November 28, 1950.

170 And afterwards on, to wit, the 14th day of December, 1950 came the Appellee by his attorneys and filed in the Clerk's office of said Court his certain Appearance in words and figures following, to wit:

171

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 50 C 1220) * *

APPEARANCE

In compliance with Rule 10 (c) of the United States Court of Appeals for the Seventh Circuit, I, Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, hereby do enter my appearance as attorney for the Defendant-Appellee in the above entitled case.

Otto Kerner, Jr.
Otto Kerner, Jr., United States Attorney for the Northern District of Illinois

172 United States of America)
Northern District of Illinois) ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in ac-

cordance with the Designation of Appellant, filed in this Court in the cause entitled: Samuel D. Cates, trading as Glory Bee Products and Glory Bee, Plaintiff, *vs.* John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois, Defendant, Civil Action, No. 50 C 1220, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the original exhibits which are incorporated herein by direction of this Court, upon Stipulation of the parties herein.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 14th day of December, 1950.

Roy H. Johnson
Clerk
By Gizella Butcher
Deputy Clerk

(Seal)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed February 5, 1951, in:

Cause No. 10312.

Samuel D. Cates, trading as Glory Bee Products and Glory Bee,
Plaintiff-Appellant,

vs.

John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois,
Defendant-Appellee,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 29th day of June, A. D. 1951.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the third day of October in the year of our Lord one thousand nine hundred and fifty, and of our Independence the one hundred and seventy-fifth:

Samuel D. Cates, trading as Glory Bee Products, and Glory Bee, *Plaintiff-Appellant,* 10312 *vs.* John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

And afterward, to-wit, on the twenty-fifth day of April, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, April 25, 1951.

Before:

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

Samuel D. Cates, trading as Glory Bee Products, and Glory Bee, *Plaintiff-Appellant,* 10312 *vs.* John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of the record, and on briefs of counsel, and on oral argument by Mr. Edward Brodkey, counsel for the appellant, and by Mr. John Peter Lulinski, counsel for the appellee, and the Court takes this matter under advisement.

And afterward, to-wit, on the twenty-third day of May, 1951, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10312. October Term, 1950, April Session, 1951.

Samuel D. Cates, trading as Glory Bee Products and Glory Bee,
Plaintiff-Appellant,
vs.
John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 23, 1951.

Before DUFFY, FINNEGAN and LINDLEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* In this action plaintiff seeks to restrain and enjoin the postmaster of the city of Chicago from carrying out the terms of a Fraud Order issued by the Postmaster General after a hearing. The district court denied the plaintiff's motions for a preliminary injunction and for a permanent injunction, and dismissed the complaint.

In the complaint herein plaintiff described in detail the administrative procedure of the Post Office Department with reference to the hearing before that agency which led to the issuance of the Fraud Order. Appellant, trading as Glory Bee Products and Glory Bee, was charged with conducting a scheme for obtaining money through the mails by means of pretenses which were knowingly false and fraudulent, in violation of Secs. 259 and 732, Title 39,

U.S.C. Appellant advertised its products, "Glory Bee Fast Luck Brand Incense" and "Incense Number Tablets," by sending printed circulars through the mails.

In answer to the complaint filed in the proceedings before the Post Office Department, appellant admitted that he had, in order to sell his products, caused to be printed and disseminated through the mails the circulars referred to, but he denied that the import of such advertising was as stated in said complaint, and also denied that any false or fraudulent representations had been made. On the hearing before the trial examiner, the government offered the testimony of a post office inspector and a medical officer of the Federal Food and Drug Administration. Appellant herein did not offer any testimony. The trial examiner, after the hearing, made findings of fact and recommendations to the Postmaster General for the issuance of a fraud order. On August 16, 1950, the Postmaster General issued the Fraud Order.

Appellant contends that before a valid fraud order may be issued the Postmaster General and the Post Office Department must subject themselves to the provisions and requirements of the Administrative Procedure Act of 1946, *5 U. S. C. 1001, et seq.*, and grant a fair hearing as required by Sec. 5(c) of that act.

The terms of the statutes under which the Fraud Order here under consideration was issued,[1] make no provision for a hearing in connection with the issuance of fraud orders, but provide, "The Postmaster General may, upon evidence satisfactory to him," issue such orders. After it was held in *American School of Magnetic Healing* v.

1. 39 U.S.C. 259 provides in part: "The Postmaster General may, upon evidence satsifactory to him * * * that any person or company is conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. * * *"

39 U.S.C. 732 provides in part: "The Postmaster General may, upon evidence satisfactory to him that * * * any person or company is conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order * * * and may provide by regulation for the return to the remitters of the sums named in such money orders."

McAnnulty, 187 U. S. 94, that a court review could be had to test the validity of such fraud orders, the constitutionality of the sections authorizing their issuance was upheld in *Public Clearing House* v. *Coyne*, 194 U. S. 497, and *Donaldson* v. *Read Magazine*, 333 U. S. 178.

Despite these rulings, appellant contends that the Fraud Order here involved is void for failure on the part of the Postmaster General to comply with the Administrative Procedure Act. Appellant specifically relies on the language of Sec. 5, as follows:

> "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * *.
>
> * * * * *
>
> "(c) The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision * * * no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. * * *"

We think that by its very terms the Administrative Procedure Act, applying as it does to cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing," is inapplicable to a mail fraud order issued under 39 U. S. C. Secs. 259 and 732, since those statutes contain no requirement for hearing or opportunity therefor.

The legislative history of the Administrative Procedure Act generally, or in connection with the provisions of Sec. 5, will not be referred to as it has been held to be "more conflicting than the text is ambiguous." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49. In that case, however, it was ruled (p. 50):

> "We think that the limitation to hearings 'required by statute' in Sec. 5 of the Administrative Procedure

> Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. * * *"

This is a definite and decisive construction of the statute rendering the Administrative Procedure Act inapplicable to the Fraud Order in question because, first, no hearing is required under 39 U. S. C. Secs. 259 and 732, and, second, these statutes are constitutionally valid without any hearing requirement having been read into them.

On this point, it was similarly concluded in *Bersoff* v. *Donaldson*, DC, Cir., 174 F. 2d 494, 495, *viz.*:

> "* * * In our opinion these provisions of the Act do not apply to mail fraud orders as Section 5, U. S. C. A. Section 1004, thereof confines the prescribed procedure to cases of adjudication '*required by statute* to be determined on the record after opportunity for an agency hearing.' The fraud order statutes do not in terms require a hearing. Therefore, we think, they do not come within the scope of the procedural provisions of the Administrative Procedure Act. * * *"

It is clear that the contention of appellant that the Administrative Procedure Act should have been applied and followed in the issuance of the Fraud Order involved is without merit.

As to the merits, appellant contends that there was nothing inherently fraudulent in his business of selling incense, concerning which he says there is an old and respectable superstition concerning good luck. He further points out that in various places in his circulars and advertising he used such explanations as "Remember we sell our incense only for what it actually is. We absolutely make no supernatural claims for our products," and in the opening paragraph of the circular letter sent out by appellant he stated, "Note, I don't claim any supernatural powers in luck." Likewise some of appellant's advertisements contained a promise that if the purchaser were not delighted and completely satisfied, the purchase price of the product would be refunded.

"Fast Luck Brand Incense" consisted of an aromatic oil and coloring in a sawdust base. The incense itself was no different than ordinary commercial incense. With each pound of Fast Luck Brand Incense appellant included as a "special gift" a package of "Number Tablets," which tablets were composed of an aromatic oil in a charcoal base, containing numbers made of ink saturated with copper sulphate. These numbers made their appearance in the burning incense when the tablets were lighted. The incense, lucky numbers, and the container were sold for $5.

The senior trial examiner, after a hearing, made findings which were approved and adopted by the Solicitor, and later adopted by the Postmaster General. The record discloses that the findings are supported by substantial evidence. Appellant went much further in his advertisements and circulars than to offer his incense, as he contends, for what it was, that is, ordinary commercial incense. His sales efforts were predicated upon the use of his incense as a luck-changing medium. His advertisements were designed to prey upon the superstitious beliefs of ignorant people.

As an example of the kind of advertisements used by appellant in Grier's Almanac for the States of North Caroline, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Louisiana, Texas, and Arkansas, the following heading appeared in large black type: "DON'T GIVE UP! LUCK MAY CHANGE FOR YOU INTO POWER AND GLORY!" Small print followed, reading: "Read very carefully—then decide! How you may find Good Fortune, Happiness, according to legend, same as I found it. I was real down—so blue, confused, just couldn't think what to do. Then I learned how Incense could soothe and calm—how it relax me—help me meditate what to do. It seemed like magic the way things got. I want you to know the amazing calming power of this Incense that helped me so much. * * *"

Numerous testimonials were printed in some of the circulars. Appellant referred to them in his advertisements as "personal excerpts from users of Glory Bee Fast Luck Brand Incense (containing) their sincere, heartfelt emotions of thankfulness." These testimonials purported to attribute to the use of appellant's incense such results as better health, improved financial conditions, "power" to meet family obligations, wonderful changes for the better

in the family home, the obtaining of profitable employment, improved social power, peace in the home, and acquisition of new "pep." The lucky number tablets also were credited with bringing luck, cheer and good fortune to the user. The incense was described in other advertisements as "amazing." In addition to the foregoing statements, the findings contained the following: "Thus, this respondent (appellant here) by these advertising devices vouches through his advertising literature for the validity of the 'legend' and endorses it as worthy of belief. He misleads his superstitious readers to believe that the 'legend' is reality, and offers for sale the instrumentalities by means of which he shows this has been and can be accomplished. * * * He has composed advertisements well calculated to deceive and defraud the ignorant, the credulous and the superstitious." The Postmaster General concluded that such statements materially misrepresented the value of appellant's incense, its efficacy, and the benefits to be derived from the use thereof, and that from evidence satisfactory to him that appellant was engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of Secs. 259 and 732, Title 39, U. S. C.

The finding that appellant engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises is a finding of fact, which by statute is committed to the Postmaster General and will not be reviewed by the courts when it is fairly arrived at and has substantial evidence to support it so that it cannot justly be said to be palpably wrong and arbitrary. *Leach* v. *Carlile,* 258 U. S. 138, 139. The buying public does not ordinarily carefully study or weigh each word in an advertisement and the ultimate impression upon the mind of the reader arises not only from what is said but also all of that which is reasonably implied. *Aronberg* v. *Federal Trade Comm.,* 7 Cir., 132 F. 2d 165, 167. The important criterion is the net impression which the advertisement is likely to make upon the purchasers to whom the advertisement is directed. *Charles of the Ritz Distributors Corp.* v. *Federal Trade Comm.,* 2 Cir., 143 F. 2d 676, 680. It has been held that even if an advertisement is so worded as not to make an express misrepresentation, nevertheless if it is artfully designed to mislead those responding to it, the mail fraud statutes are applicable. *Durland* v. *United States,* 161 U. S. 306, 313; *McCarthy* v. *United States,* 2 Cir., 187 F. 117.

What the Supreme Court said in *Donaldson* v. *Read Magazine, supra,* p. 189, is applicable to the case at bar:

> "* * * That exceptionally acute and sophisticated readers might have been able by penetrating analysis to have deciphered the true nature of the contest's terms is not sufficient to bar findings of fraud by a fact-finding tribunal. Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds. *Durland* v. *United States,* 161 U. S. 306, 313, 314; *Wiser* v. *Lawler, supra,* at 264; *Oesting* v. *United States,* 234 F. 304, 307. People have a right to assume that fraudulent advertising traps will not be laid to ensnare them. 'Laws are made to protect the trusting as well as the suspicious.' *Federal Trade Comm.* v. *Standard Education Society,* 302 U. S. 112, 116."

The administrative determination of whether the representations made by appellant left readers with a false impression is to be accepted if there is a rational basis for such conclusion. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286-287; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146. As the findings of the Postmaster General are supported by substantial evidence and as we find nothing arbitrary or palpably wrong in his conclusions, the district court correctly denied the motion for a permanent injunction and dismissed the complaint. The judgment is

AFFIRMED.

And on the same day, to-wit, on the twenty-third day of May, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, May 23, 1951.

Before:

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

Samuel D. Cates, trading as Glory Bee Products, and Glory Bee, *Plaintiff-Appellant,* 10312 *vs.* John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

And afterward, to-wit, on the fifth day of June, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, June 5, 1951.

Before:

Hon. Philip J. Finnegan, Circuit Judge.

Samuel D. Cates, trading as Glory Bee Products, and Glory Bee,
Plaintiff-Appellant,
10312 *vs.*
John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On motion of counsel for the plaintiff-appellant, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed for a period of thirty (30) days pursuant to the provisions of Rule 25 of the Rules of this Court.

And afterwards, to-wit, on the twenty-seventh day of June, 1951, there was filed in the office of the Clerk of this Court a designation of record, which said designation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Samuel D. Cates, trading as Glory Bee Products, and Glory Bee,
Plaintiff-Appellant,
vs.
John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois,
Defendant-Appellee.
No. 10312.

DESIGNATION OF RECORD IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit:

Please prepare, for application for a Writ of Certiorari in the Supreme Court of the United States the Record in the United States Court of Appeals, for use in the printed record to be filed in the Supreme Court of the United States in connection with said application for a Writ of Certiorari, the following:

1. The hearing on oral argument and order taking the matter under advisement.
2. The opinion of the Court.
3. The Order of the Court.
4. The Judgment or Decree of the Court.
5. The Order staying the issuance of mandate for a period of thirty (30) days.
6. This designation.

Frank E. Gettleman,
Arthur Gettleman
Edward Brodkey,
Attorneys for Plaintiff-Appellant.

Endorsed: Filed June 27, 1951. Kenneth J. Carrick, Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and the proceedings had, made in accordance with the designation of record, filed June 27, 1951, in:

Cause No. 10312.

Samuel D. Cates, trading as Glory Bee Products and Glory Bee,
Plaintiff-Appellant,

vs.

John Haderlein, as Postmaster of the City of Chicago, in the County of Cook and State of Illinois,
Defendant-Appellee,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 29th day of June, A. D. 1951.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

JUL 2 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 166

SAMUEL D. CATES, TRADING AS GLORY BEE PRODUCTS AND GLORY BEE,

Petitioner,

vs.

JOHN HADERLEIN, AS POSTMASTER OF THE CITY OF CHICAGO, IN THE COUNTY OF COOK AND STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

FRANK E. GETTLEMAN,
ARTHUR GETTLEMAN,
EDWARD BRODKEY,
Counsel for Petitioner.

June 29, 1951.

THE BLAKELY-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

SAMUEL D. CATES, TRADING AS GLORY BEE PRODUCTS AND GLORY BEE,

Petitioner,

vs.

JOHN HADERLEIN, AS POSTMASTER OF THE CITY OF CHICAGO, IN THE COUNTY OF COOK AND STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

Petitioner, Samuel D. Cates, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case entered on May 23, 1951 affirming the decision of the United States District Court for the Northern District of Illinois, Eastern Division, dated October 27, 1950.

OPINIONS BELOW.

The findings of fact, conclusions of law, memorandum opinion and Order of the District Court (R. 100-101) are unreported. The opinion of the Court of Appeals for the Seventh Circuit (R. 119) is not yet reported.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the Postmaster General and the Post Office Department, in their conduct of hearings under Sections 259 and 732 of Title 39 United States Code, after the effective date of the Administrative Procedure Act of 1946, *5 U. S. C. 1001, et seq.*, were required to subject themselves to the provisions and requirements of said Administrative Procedure Act and to grant a fair hearing as required by Section 5(c) of that Act if their resulting orders were to have validity.

STATUTES INVOLVED.

The relevant portions of the Statutes applicable to the question herein presented follow:

Section 5 of the Administrative Procedure Act of 1946, *5 U. S. C. 1001, et seq.*, provides in part:

> "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * *
>
> * * * * * *
>
> "(c) The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision * * * no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any

agency. No officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. * * *."

Section 259 of Title 39 U. S. C. provides in part:

"The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. * * *"

Similarly, *Section 732 of Title 39 U. S. C.* provides in part:

"The Postmaster General may, upon evidence satisfactory to him that * * * any person or company is conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order * * * and may provide by regulation for the return to the remitters of the sums named in such money orders."

Public Law 843, 81st Congress, second Session, effective only on and after September 27, 1950, provides:

"Proceedings under law relating to the exclusion

or expulsion of aliens shall *hereafter* be without regard to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act." (Emphasis supplied.)

STATEMENT.

This is a proceeding by which the Petitioner herein seeks an injunction against John Haderlein, as Postmaster of the City of Chicago, Illinois, to restrain him from carrying out the terms of a Fraud Order issued by the Postmaster General on August 16, 1950. The fraud order was issued after a hearing before a Trial Examiner of the Post Office Department. This hearing was not conducted in accordance with the requirements of the Administrative Procedure Act of 1946, to the provisions of which the Postmaster General does not believe himself or his Department subject.

1. In the administrative complaint to the Solicitor of the Post Office Department, dated March 6, 1950, it was charged that Petitioner herein was conducting a scheme for obtaining money through the mails by means of pretenses knowingly false or fraudulent in violation of the Statute (Sections 259 and 732 U. S. C.) in making certain advertising representations in his sale of incense products through the mails. Petitioner's answer thereto admitted his dissemination of the circular matter in question through the mails but denied the import of those advertisements as they were characterized by the Postmaster General and denied that he had made any false or fraudulent representations or promises in violation of the Statute.

2. Issue being so joined, a hearing was had in said proceeding before a Trial Examiner of the Post Office Department on March 22, 1950. At this hearing, the government offered the testimony of a post office inspector

and a medical officer of the Federal Food and Drug Administration. Petitioner herein did not offer any evidence.

3. Thereafter, on August 14, 1950, the Trial Examiner filed his Findings of Fact and Recommendation, which were approved by the Solicitor of the Post Office Department and formed the basis for the fraud order of the Postmaster General. The Trial Examiner categorically rejected Petitioner's contention that he was selling his incense for what it was, without lying about it, and found that by the tenor and effect of his advertising Petitioner was vouching for the truth of the old and respectable superstition that incense might bring its users good luck.

4. Petitioner filed his complaint for injunction in the District Court on August 30, 1950. He charged that the findings of the Trial Examiner of the Post Office Department and the Fraud Order of the Postmaster General based thereon found no support in substantial evidence but were manifestly against its weight, and that the entire administrative proceeding and resulting fraud order were void for failure of the Postmaster General before that time to comply with the requirements of the Administrative Procedure Act of 1946 and to grant Petitioner the fair hearing prescribed by that Act, including *inter alia*, but without limitation, a complete separation of the investigative and prosecutory from the adjudicative functions on hearing within the agency. Respondent herein filed his answer in the District Court and the matter was argued orally before the District Judge both on Petitioner's motion for preliminary injunction and temporary restraining order and on his motion for permanent injunction.

5. On October 27, 1950, the District Court entered its

Order finding that there was sufficient substantial evidence produced by the Post Office Department at its hearing to support the issuance of the fraud order by the Postmaster General and that proceedings by the Postmaster General under Sections 259 and 732 of Title 39 U. S. C. are not within the provisions of the Administrative Procedure Act. It accordingly denied Petitioner's prayer for injunction and dismissed his complaint.

6. On appeal to the United States Court of Appeals for the Seventh Circuit, this Petitioner urged that the District Court had erred (R. 105) in so finding that the Administrative Procedure Act of 1946 and particularly but without limitation Sections 2, 5, 7, 8 and 11 thereof were inapplicable to the conduct of proceedings by the Postmaster General for the issuance of a "fraud order" under Title 39 U. S. C., Sections 259 and 732; and further, that the District Court erred in its failure to find that such proceedings by the Postmaster General are required to be conducted in accordance with the provisions of said Administrative Procedure Act and if such be not done, the said proceedings, including any findings or order resulting therefrom are void and of no force and effect.

7. The United States Court of Appeals affirmed the judgment of the District Court on May 23, 1951, saying that:

> "The terms of the statutes under which the Fraud Order here under consideration was issued, make no provision for a hearing in connection with the issuance of fraud orders, but provide, 'The Postmaster General may, upon evidence satisfactory to him,' issue such orders. * * * the constitutionality of the sections authorizing their issuance was upheld * * *" and
>
> "We think that by its very terms the Administrative Procedure Act, applying as it does to cases 'of adjudication required by statute to be determined on the record after opportunity for an agency hearing,' is

inapplicable to a mail fraud order issued under 39 U. S. C., Secs. 259 and 732, *since those statutes contain no requirement for hearing* or opportunity therefor." (Emphasis supplied.)

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the Seventh Circuit erred:

(1) In holding that the Administrative Procedure Act of 1946 was inapplicable to a mail fraud order issued under 39 U. S. C., Secs. 259 and 732.

(2) In failing to hold that the Administrative Procedure Act of 1946 was applicable to all hearings held pursuant to 39 U. S. C., Secs. 259 and 732 and that in the absence of compliance with the terms of said Administrative Procedure Act in the conduct of hearings under 39 U. S. C., Secs. 259 and 732, the resulting findings and Fraud Order were void.

(3) In affirming the Order and Judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

1. Importance of the Question Presented.

The instant case presents a question of the utmost importance in the interpretation of a major federal procedural statute, the Administrative Procedure Act of 1946. One of the principal purposes of this Act was to insure a fair hearing to those persons having business with the many federal agencies. The Court of Appeals for the Seventh Circuit has decided that the requirements of fairness imposed by that Act are not applicable to proceedings of the Post Office Department leading to the issuance of Fraud Orders. In view of the fact that this Court has already

decided that that Act is applicable to the proceedings of other Federal Departments and agencies, *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), *Riss and Company, Inc.* v. *United States and Interstate Commerce Commission*, 341 U. S. 907, 71 S. Ct. 620 (1951), it seems desirable that the question of its applicability to proceedings by the Postmaster General should likewise be settled by this Court. Petitioner believes the Court of Appeals has herein decided this federal question in a way probably in conflict with applicable decisions of this Court. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33.

2. The Applicability of Section 5 of the Administrative Procedure Act is Not Limited to Cases Where a Statute in Terms Requires a Hearing. It Extends to Cases Where a Hearing is Required by Judicial Construction.

The Court of Appeals decided that the Administrative Procedure Act did not require observance of its procedural safeguards when the Postmaster General should conduct hearings under the mail fraud statutes; that the provisions of that Act for independence of the Trial Examiner, in his tenure and control, and for separation of functions within the agency, had no application to the proceedings of this particular Department. It based that decision on the fact that Sec. 5(c) of the Administrative Procedure Act states that it is applicable

> "In every case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing, * * *." (Italics ours.)

And the Court of Appeals points out that there is no requirement for such a hearing *expressly* set out in either Section 259 or 732 of the postal laws, both of which specify that the Postmaster General may issue a Fraud Order "upon evidence satisfactory to him."

The necessity of an express requirement for hearing in the applicable statute before the Administrative Procedure Act should apply was urged by the United States Immigration Service and rejected by this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950). This Court there said:

"* * * The Government contends that there is no express requirement for any hearing or adjudication in the Statute authorizing deportation, and that this omission shields these proceedings from the impact of Section 5. Petitioner, on the other hand, contends that deportation hearings, though not expressly required by Statute, are required under the decisions of this Court, and the proceedings, therefore, are within the scope of Section 5.

* * * * *

"We think that the limitation to hearings 'required by Statute' in Section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the Statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one created by it as a matter of expediency.

* * * * *

"We find no basis in the purposes, history or text of the Act for judicially declaring an exemption in favor of deportation proceedings from the procedural safeguards enacted for general application to administrative agencies. We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act *if resulting orders are to have validity.*" (Italics ours.)

And this Court recently came to the same conclusion with respect to the proceedings of the Interstate Commerce Commission in *Riss and Company, Inc.* v. *United States and Interstate Commerce Commission*, 341 U. S. 907, 71 S. Ct. 620 (1951).

It is noteworthy that the Court of Appeals of the Seventh Circuit was also guided in its decision by the previous decision in *Bersoff* v. *Donaldson*, DC Cir., 174 F. 2d 494, 495 (1949), wherein that Court, in the District of Columbia Circuit, erroneously held:

> "The fraud order statutes do not *in terms* require a hearing. Therefore, we think, they do not come within the scope of the procedural provisions of the Administrative Procedure Act." (Emphasis supplied.)

Such decision was, of course, prior to the decision in the *Sung* case, *supra*, in which this Court rejected the proposed requirement that express provision for hearing be contained within the language of the statute.

3. The Mail Fraud Statute Requires a Hearing Before the Post Office Department.

Assuming then that Section 5 of the Administrative Procedure Act is applicable not only where the statute in terms requires a hearing but also where the statute must be construed to require a hearing in order to satisfy constitutional limitations, the next question is whether the fraud order statute must be so construed. It is submitted that in order to satisfy the guaranties of due process the statute must be construed as requiring a hearing before the agency.

The Court of Appeals herein was persuaded that:

> "• • • the Administrative Procedure Act (is) inapplicable to the Fraud Order in question because, first, no hearing is required under 39 U. S. C., Secs. 259 and

732, and, second, these statutes are constitutionally valid without any hearing requirement having been read into them."

In support of the proposition that no hearing is required by judicial construction as a prerequisite to the issuance of a fraud order under the statutes noted, the Court of Appeals relied on *Public Clearing House* v. *Coyne*, 194 U. S. 497 (1904), which was a "seizure" case wherein there was a full hearing on the merits before a Master in Chancery after the fraud order had been issued by the Postmaster General. In holding the applicable statutes constitutional without the express requirement of a prior hearing, this Court predicated its decision upon (1) the fact that the Post Office was a dispenser of privileges, so that there might be no deprivation of property without due process of law, and (2) that there was adequate opportunity for judicial review.

On the other hand, we must note that in the recent case of *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), this Court did not hesitate to hold that a hearing was required under the Administrative Procedure Act in connection with deportation proceedings of the Immigration Service, an agency which, like the Post Office Department, claimed that it was a dispenser of privileges only and on that account exempt from the requirement of granting a hearing.

One could reasonably argue that the language of the statute which permits the Postmaster General to issue a fraud order "*on evidence satisfactory to him*" (emphasis supplied) presupposes that a hearing be held wherein some evidence could be adduced. But this Court in *Reilly* v. *Pinkus*, 338 U. S. 269 (1950), has saved us that trouble and speculation. In that case, which was also a suit to enjoin a Postmaster from enforcing a fraud order, after agency hearing, this Court affirmed the decision of the District Court in granting the injunction for the reason that the

respondent in the administrative proceeding had been restricted in his opportunity to cross-examine. This Court, speaking through Mr. Justice Black said:

> "Second. Nevertheless, we are constrained to hold that the present fraud order should not be enforced. It has been pointed out that the doctors' expert evidence rested on their general professional knowledge. To some extent this knowledge was acquired from medical text books and publications, on which these experts placed reliance. In cross-examination respondent sought to question these witnesses concerning statements in other medical books some of which at least were shown to be respectable authorities. The questions were not permitted. We think this was an undue restriction on the right to cross-examination."

Certainly, if this Honorable Court adheres to a requirement for adequate opportunity for cross-examination in order to assure that there will be no deprivation of due process of law, and so holds in a Post Office fraud case like the one at bar, it would seem necessarily to follow that there must be such a hearing, in the first instance, as a matter of law, or far more injury will be done than by a simple denial of the right to cross-examine. To dispense with the requirement for a hearing in such case would be to dispense with *all* opportunity for cross-examination and to deprive us of what Professor Wigmore regards as our greatest procedural guarantee of trustworthiness.

There has not been any occasion to present squarely for judicial decision the question whether a fraud order could be entered without a hearing because the traditional practice of the Post Office Department is to grant a hearing. The *ratio decidendi* of most of the cases involving fraud orders has been that after analysis of the evidence presented at the hearing the court concludes that the order of the Postmaster General either was or was not within his statutory power. The question of the adequacy of the

hearing, when it has arisen at all, has been decided in favor of the hearing. But it is quite clear that all of the decisions assume, where they do not actually say so, that a hearing with a record is contemplated by the statute.

The Post Office Department has taken the position administratively that the statute does not require a hearing, but that as an act of administrative grace one is always given and that the customary hearing accords fully with the concept of "fair play."[1]

On the record of such a hearing many orders have been reviewed by the courts in suits to enjoin the enforcement of the orders. No attempt will be made to discuss all of the cases, but enough of them will be cited to demonstrate that they either refer to the necessity of hearing or presuppose such necessity. It is believed that they point to the necessary conclusion that a hearing on the record is a statutory and constitutional requirement.

It is sometimes argued that there is no constitutional right to have one's mail carried by the government, hence procedural due process is not a requirement for revocation of mailing privileges. As will presently appear, the courts today are not taking this narrow view, even though it may have been suggested by some of the earlier decisions. The 1904 case of *Public Clearing House* v. *Coyne*, 194 U. S. 497 (1904), said that the power vested in Congress by the Constitution to establish a postal system is permissive and that, therefore, Congress had the right to designate what may be carried in the mails and what may be excluded. The constitutionality of the fraud order provision was upheld. But this Court recognized that even Congress was without power to extend the benefits of postal service to one class of persons and deny them to another of the same class. The Court

1. See speech of Frank J. Delany, Solicitor, Post Office Department, at Institute conducted by New York University School of Law, February 1-8, 1947 (published by New York University School of Law in Proceedings of the Institute at pp. 196-206).

did say that the postal service is by no means an indispensable adjunct to a civil government in the same sense that the protection of life, liberty and property is a governmental function. But certainly, in the light of later cases, this is not to be construed to mean that the power to use the mails can arbitrarily be granted or withheld.

In *Burton* v. *United States*, 202 U. S. 344 (1906), this Court declared that the authority of the Post Office Department in the protection of the mail "has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; *such designation and exclusion to be, however, consistent with the rights of the people as reserved by the Constitution.*" (Emphasis supplied.) And Mr. Justice Brandeis, in a dissenting opinion in *United States, ex rel., Milwaukee Publishing Company* v. *Burleson*, 255 U. S. 407, 430 (1921), emphasized that the power of Congress over the postal system "like all its other powers is subject to the limitations of the Bill of Rights."

Certainly the view of the function of the Post Office Department which presently prevails is that stated by Chief Justice Groner of the United States Court of Appeals for the District of Columbia in *Pike* v. *Walker*, 73 App. D. C. 289, 121 F. 2d 37 (1941), *cert. den.* 314 U. S. 625, *rehearing denied* 314 U. S. 710, in the following language (at p. 39):

> "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post

Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution, and if they have, it would follow that in administering the laws established to protect the mail and the regulations thereunder the duty of the Postmaster General would be,—to use the language of Justice Brandeis in the *Burleson* case, *supra*,—that:

> " 'In making the determination he must, like a court or a jury, form a judgment whether certain conditions prescribed by Congress exist, on controverted facts or by applying the law. The function is a strictly judicial one, although exercised in administering an executive office. And it is not a function which either involves or permits the exercise of discretionary power' * * *

which is to say, that his authority is governed by the Acts of Congress which confer it, and by the law of the land."

Pike v. *Walker* involved a fraud order and it is one of the most significant of the recent cases. There this Court in effect rejected the contention of the government that no individual has a natural or constitutional right to have his communications delivered by the postal establishment and, hence, that a fraud order may be issued summarily and without any notice or any hearing. In stating the government's argument, the Court of Appeals said that the Postmaster General "insists that since no hearing is required, the courts are without power or authority to consider whether an adequate hearing was accorded." Disagreeing with this contention the Court said that "the proposition urged by the Postmaster General and accepted by the Court below is too far reaching to be admitted until specifically recognized and declared by the Supreme Court." Certainly this opinion assumes that a hearing and other procedure conformable to due process is required by the statute.

It is interesting to note that the government has been

has frequently acted administratively to bar from the mails allegedly obscene matter, and it has been held that his action is not reviewable by the courts unless his judgment has been wholly arbitrary and without foundation. *Anderson* v. *Patten*, 247 Fed. 382 (D. C. S. D. N. Y., 1917). In *Walker* v. *Popenoe*, the Court squarely held that the order of the Postmaster General barring plaintiff's pamphlet from the mails as obscene, without a hearing, was invalid as a violation of due process. The requirement for notice and hearing was discussed at some length in a concurring opinion by Mr. Justice Arnold which the Court stated also represented the views of that Court.[3] It is interesting to note that, although the case arose under the statute barring obsence matter and did not involve a fraud order, Mr. Justice Arnold quoted from *Pike* v. *Walker* to support the proposition that due process of law requires a hearing as a prerequisite to action barring obscene matter from the mails.

In *Plapao Laboratories, Inc.* v. *Farley*, 92 F. 2d 228 (1937), *cert. den.* 302 U. S. 732, the Court of Appeals for

3. Mr. Justice Arnold stated in his opinion (at 149 F. 2d 513) that:

> The power to exclude a publication from the mails without a hearing in practical effect permits the Postmaster General to cause irreparable injury to any publisher without the minimum safeguard of an opportunity to present his case. There are, of course, other means of distribution besides the mails, but they are not effective ones in the case of ordinary publications. To deprive the publisher of the use of the mails is like preventing a seller of goods from using the principal highway which connects him with his market. In making the determination whether any publication is obscene the Postmaster General necessarily passes on a question involving the fundamental liberty of a citizen. This is a judicial and not an executive function. It must be exercised according to the ideas of due process implicit in the Fifth Amendment.

Following the above quotation Mr. Justice Arnold quoted with approval the same language from *Pike* v. *Walker* which is set out verbatim, *supra*.

the District of Columbia had before it an appeal from a decree of the District Court dismissing a bill to restrain enforcement of a fraud order. It was contended, among other things, that the procedure of the Post Office Department did not comply with the requirements enunciated by this Court in *Morgan* v. *United States*, 298 U. S. 468 (1936). It appeared in the *Plapao* case that an assistant solicitor had presided at the hearing. He heard and considered the charges and received evidence which he analyzed and reported to the Acting Postmaster General. The report, being satisfactory to the Acting Postmaster General, was acted on by that officer who issued the fraud order that was challenged. The Court said:

> "Appellants confidently rely upon *Morgan* v. *United States*, 298 U. S. 468, 56 S. Ct. 906, 910, 80 L. Ed. 1288, seeking to enjoin the enforcement of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies for buying and selling livestock. 'The outstanding allegation' in that case '* * *' is that the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted. That the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department.' The mere statement of this allegation is sufficient to distinguish the Morgan case from the present appeal. In the present case the procedure was old, and the Acting Postmaster General considered the evidence. In the Morgan case the Court said: 'The Secretary who, according to the allegation, had neither heard nor read evidence or argument, undertook to make the findings and fix the rates. The Assistant Secretary, who had heard, assumed no responsibility for the findings or order, and the Secretary, who had not heard, did assume that responsibility'."

Thus, the Court distinguished the type of hearing given in the *Plapao* case from that condemned in the *Morgan* case, concluding that the Post Office hearing was not subject to the same infirmities as the hearing involved in the *Morgan* case. But underlying the *Plapao* opinion is the basic assumption that there must be a fair hearing.

It should be noted that in reviewing postal fraud orders the courts have applied the rule of review that the findings of the Postmaster General will be accorded great weight and that they will not be disturbed if there is substantial evidence to support them. This is the rule which, at least as a general proposition, applies where findings are entered after full hearing. Typical of the cases where this rule was followed in reviewing postal fraud orders is *Leach* v. *Carlile*, 258 U. S. 138 (1922), which involved an appeal from a Circuit Court of Appeals decision affirming a District Court decree dismissing a suit to enjoin enforcement of a fraud order. This Court said (at p. 139):

> "The order complained of was entered *after an elaborate hearing*, of which the appellant had due notice and at which he was represented by counsel, and introduced much evidence."

After referring to the facts the Court further said (at pp. 139-140):

> "This was a question of fact which the statutes cited committed to the decision of the Postmaster General, and the applicable, settled rule of law is that the conclusion of a head of an executive department on such a question, when committed to him by law, will not be reviewed by the courts, *where it is fairly arrived at and has substantial evidence to support it*, so that it cannot justly be said to be palpably wrong and therefore arbitrary." (Emphasis supplied.)

The language just quoted has a familiar ring often heard in decisions upholding orders based on a record made at a full hearing.

See also *Donaldson* v. *Read Magazine*, 92 L. ed. 440 (1948). And in *Farley* v. *Simmons*, 99 F. 2d 343 (1938), *cert. denied* 305 U. S. 651, *rehearing denied* 305 U. S. 676, the Court of Appeals said (at p. 348):

> "We think it cannot be said that the evidence upon which rested the findings of the Postmaster General was so insubstantial as to render the findings arbitrary."

The Post Office Department's practice of issuing fraud orders only after hearing certainly must be counted as an important factor making for judicial acceptance of the record and findings. Surely, the cases make it clear that this judicial acceptance grows out of the assumption that a fair hearing has in fact been accorded.

Moreover, the necessities of judicial review require a hearing. If there has not been a hearing on a record, how can there be adequate judicial review of orders required to be based on evidence? It is not necessary, certainly, to discuss the due process requirement of judicial review. But for the purpose of this supporting brief it can be merely stated that where administrative orders vitally affect property interests there must be adequate judicial review. See: *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38 (1936).

Time and again, when discussing judicial review, courts have referred to the necessity of reviewing the record. Thus, in *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80 (1943), this Court said (at p. 87):

> "The grounds upon which an administrative order must be judged are those grounds upon which the record discloses that its action was based."

Where statutes do not specifically provide for judicial review, the processes of equity are usually available for judicial review, as in the case of proceedings to enjoin postal fraud orders. Whether judicial review is specifically provided by statute or not, such review in the ordinary proceeding is only possible upon a record. Certainly no contention can be made at this late date that postal fraud orders are not judicially reviewable, in the light of the fact that the courts have repeatedly reviewed such orders in equity actions to enjoin. It follows that judicial review of such order is only possible upon a record made at an administrative hearing.

In view of the basic character of postal fraud orders, and their far-reaching effect on American business, it seems so clear as not to require argument that if Section 259 were construed not to require a hearing it would be unconstitutional, or, at the very least, there would be a serious doubt as to its constitutionality. It has been settled by many court decisions that when the constitutionality of a statute is in question, if the statute is reasonably susceptible of two constructions, by one of which it would be unconstitutional and by the other valid, it is the court's duty to adopt that construction which will save the statute from constitutional infirmity.

It is submitted that even though the procedure followed in particular cases may be fair, that fact does not in any way bear upon the construction that must be given the statute. The fraud order statute must, if possible, be construed so as to avoid constitutional doubt. It has already been shown that the courts have so construed it; they have in effect, where they have not in express terms, held that the statute requires a hearing.

Since postal fraud orders can only lawfully and constitutionally be entered on a record after opportunity for

an agency hearing, the procedure under the statute must be regarded as "adjudication required by statute to be determined on the record after opportunity for an agency hearing" within the meaning of Section 5 of the Administrative Procedure Act.

It seems patent, therefore, that the hearings of the Postmaster General, under Title 39 U. S. C. Sections 259 and 732, should be conducted fairly in accordance with the procedural safeguards of the Administrative Procedure Act, in like manner as those of the Commissioner of Immigration and the Interstate Commerce Commission, if they are to have validity.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

FRANK E. GETTLEMAN,
ARTHUR GETTLEMAN,
EDWARD BRODKEY,
Counsel for Petitioner.

June, 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 166

SAMUEL D. CATES, TRADING AS GLORY BEE PRODUCTS AND GLORY BEE, PETITIONER

v.

JOHN HADERLEIN, AS POSTMASTER OF THE CITY OF CHICAGO, IN THE COUNTY OF COOK AND STATE OF ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court is not reported. The opinion of the Court of Appeals for the Seventh Circuit (R. 119-125) is reported at 189 F. 2d 369.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1951 (R. 126). The petition for

a writ of certiorari was filed on July 2, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the provisions of Section 5 of the Administrative Procedure Act (5 U. S. C. 1001 *et seq.*) are applicable to fraud order proceedings conducted by the Post Office Department.

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act and the mail fraud statutes are set forth in the Appendix.

STATEMENT

Petitioner brought suit to enjoin the Postmaster of the City of Chicago from carrying out the terms of a fraud order issued by the Postmaster General after a hearing (R. 3-12). The district court's dismissal of the complaint was affirmed by the court below (R. 126).

Petitioner, doing business as Glory Bee Products and Glory Bee, was found, after notice and a hearing before the Post Office Department, to be conducting a scheme for obtaining money through the mails by means of knowingly false and fraudulent pretenses (R. 39-49). Petitioner advertised its products, "Glory Bee Fast Luck Brand Incense" and "Incense Number Tablets," by sending printed circulars through the mails (R. 120). Petitioner admitted use of the mails for dissemination

of these advertisements but denied any fraudulent representations (R. 120).

"Fast Luck Brand Incense" consisted of an aromatic oil and coloring in a sawdust base, no different from any ordinary commercial incense (R. 123). Included with each pound of this incense, as a "special gift," was a package of "Number Tablets" composed of an aromatic oil in a charcoal base, containing numbers made of ink saturated with copper sulphate (R. 123). These numbers appeared in the burning incense when the tablets were lighted (R. 123). The incense, lucky numbers, and a container were sold for $5.00 (R. 123).

Petitioner's advertisements and circulars represented the incense as a luck-changing medium and were designed to prey upon superstitious beliefs and ignorance (R. 123). Advertisements contained a heading in large black type which read: "DON'T GIVE UP! LUCK MAY CHANGE FOR YOU INTO POWER AND GLORY!" Small print stated: "Read very carefully—then decide! How you may find Good Fortune, Happiness, according to legend, same as I found it. I was real down—so blue, confused, just couldn't think what to do. Then I learned how Incense could soothe and calm —how it relax me—help me meditate what to do. It seemed like magic the way things got. I want you to know the amazing calming power of this Incense that helped me so much. * * *." (R. 123.)

Numerous testimonials were printed in advertisements as "personal excerpts from users of Glory Bee Fast Luck Brand Incense," which purported to attribute to the use of petitioner's incense such results as better health, improved financial conditions, "power" to meet family obligations, wonderful changes for the better in the family home, the obtaining of profitable employment, improved social power, peace in the home, and acquisition of new "pep." The lucky number tablets also were credited with bringing luck, cheer and good fortune to the user. (R. 123-124.)

The Post Office Department found that petitioner "vouches throughout his advertising literature for the validity of the 'legend' and endorses it as worthy of belief. He misleads his superstitious readers to believe that the 'legend' is reality, and offers for sale the instrumentalities by means of which he shows this has been and can be accomplished. * * * He has composed advertisements well calculated to deceive and defraud the ignorant, the credulous and the superstitious." (R. 62-63.)

The Postmaster General adopted the finding "that such statements materially misrepresent the value of respondent's [petitioner's] incense, its efficacy and the benefits to be derived from use thereof" (R. 63), and concluded that petitioner was "engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises" (R. 49).

In both the district court and the court below petitioner, in addition to challenging the finding of fraudulent use of the mails, contended that the administrative hearing conducted by the Post Office Department did not meet the requirements of the Administrative Procedure Act for an independent trial examiner. Both courts held that the evidence was sufficient to support the finding of fraud. The court below held that the administrative hearing was not required by the postal fraud statutes or the Constitution and, therefore, under *Won Yang Sung* v. *McGrath*, 339 U.S. 33, that the Administrative Procedure Act was not applicable.

Effective July 8, 1951, the Post Office Department provided for the establishment of independent hearing examiners in accordance with Section 5 of the Administrative Procedure Act (17 Fed. Reg. 6623). We have been advised by the Post Office Department that fraud order proceedings hereafter will be conducted before these hearing examiners.

DISCUSSION

The single basis urged for review is that the trial examiner, before whom the hearings were held, did not satisfy the standards of independence of Section 5(c) of the Administrative Procedure Act. It is not argued that the evidence does not support the finding of fraudulent use of the mails, and even a cursory examination of the record will disclose

clear support for the administrative finding (see *e.g.*, R. 15-23).

We do not challenge the applicability of the Administrative Procedure Act to fraud order proceedings of the Post Office Department. Upon the advice of the Attorney General that the decisions of this Court (*Wong Yang Sung* v. *McGrath*, 339 U. S. 33; *Riss & Co.* v. *United States*, 341 U. S. 907) so require, that Department has modified its procedures in such cases so as to comply with the requirements of the Administrative Procedure Act. This deprives the issue presented by petitioner of importance in so far as the future is concerned. In view of this fact, and because the evidence as to petitioner's fraud is plain, this Court may deem it appropriate to deny certiorari, inasmuch as in this case no good purpose would be served by delaying the protection of the public against a fraudulent use of the mails by remanding the case to the Post Office Department for another hearing at which the evidence would be the same.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

APPENDIX

The pertinent statutory provisions are set forth below:

39 U. S. C. 259 provides in part: "The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. * * *"

39 U. S. C. 732 provides in part: "The Postmaster General may, upon evidence satisfactory to him that * * * any person or company is conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order * * * and may provide by regulation for the return to the remitters of the sums named in such money orders."

Section 5 of the Administrative Procedure Act (5 U. S. C. 1004) provides:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * *
>
> * * * * * *
>
> (c) The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision * * * no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 166

SAMUEL D. CATES, TRADING AS GLORY BEE PRODUCTS AND GLORY BEE,

Petitioner,

vs.

JOHN HADERLEIN, AS POSTMASTER OF THE CITY OF CHICAGO, IN THE COUNTY OF COOK AND STATE OF ILLINOIS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY MEMORANDUM AND BRIEF FOR PETITIONER.

JOSEPH ROSENBAUM,
FRANK E. GETTLEMAN,
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THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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> (*Wong Yang Sung* v. *McGrath*, 339 U. S. 33; *Riss & Co.* v. *United States*, 341 U. S. 907), so require, that Department has modified its procedures in such cases so as to comply with the requirements of the Administrative Procedure Act. * * *"

He explains that

> "Effective July 8, 1951, the Post Office Department provided for the establishment of *independent hearing examiners* in accordance with Section 5 of the Administrative Procedure Act (17 Fed. Reg. 6623). We have been advised by the Post Office Department that fraud order proceedings *hereafter* will be conducted before those hearing examiners." (Italics ours.) *Respondent's Memorandum*, page 5.

As respondent correctly states on page 5 of his *Memorandum* that

> "The single basis urged for review is that the trial examiner, before whom the hearings were held, did not satisfy the standards of independence of Section 5(c) of the Administrative Procedure Act",

which fact he does not deny, he admits the error of the Courts below.

It should be remembered that this Court rightly concluded, in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, (1949):

> "* * * We hold that deportation proceedings *must* conform to the requirements of the Administrative Procedure Act *if resulting orders are to have validity.*" (Emphasis supplied.)

It is petitioner's position herein that failure of the Postmaster General to comply with the requirements of that Act and to grant petitioner the fair hearing required by statute has voided his fraud order, by denying petitioner the due process guaranteed him by the Constitution. Petitioner must be given not only the right to a hearing, but

to a fair hearing before an impartial and independent trial examiner who might not feel the compulsion of drawing doubtful or unreasonable inferences from the evidence adduced.

Respondent's position herein is two-fold: *First*, that the recent action of the Post Office Department in subjecting itself to the requirements of the Administrative Procedure Act, together with its assurance that fair hearings in fraud order proceedings will be granted in the future

> "* * * deprives the issue presented by petitioner of importance *in so far as the future is concerned* * * *." *Respondent's Memorandum*, page 6. (Emphasis supplied),

which completely ignores the fact that the Postmaster General admits that petitioner, and perhaps many others like him, were denied fair hearings in the past, a wrong which this Court can undo by reversing and remanding for a new hearing; and *Second*, that

> "* * * petitioner's fraud is plain, * * *" *Respondent's Memorandum*, page 6,

a violent statement, devoid of support in the evidence, and a question not presently before this Honorable Court.

Both before the Post Office Department and before the Court of Appeals, petitioner urged that his advertisements did not mean what the trial examiner found them to mean. He insisted that they were the same kind of advertisements as those approved by the Court of Appeals in the First Circuit in *Dolan* v. *Hurley*, 283 F. 695, affirmed 297 F. 825, wherein that Court held:

> "Upon a careful examination of complainant's advertisement, I have been unable to discover anything which amounts to a false statement or representation made by her; and my attention has been called to none by the defendant. Many of the so-called testimonials appear absurd and improbable, but apparently the testimonials are genuine.

No. 166. CATES, TRADING AS GLORY BEE PRODUCTS, *v.* HADERLEIN, POSTMASTER OF CHICAGO. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted. Upon consideration of respondent's confession of error and the record, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to vacate its order dismissing the complaint. *Joseph Rosenbaum* and *Alvin E. Stein* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 189 F. 2d 369.